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IN THE

# Supreme Court of the United States

**October Term, 1978**

No. 78-78-167

AMERICAN AIR FILTER COMPANY, INC., *et al.*,
*Petitioners,*

*v.*

FEDERAL TRADE COMMISSION, *et al.*,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

# Supreme Court of the United States

**October Term, 1978**

**No. 78-**

AMERICAN AIR FILTER COMPANY, INC., *et al.*,
*Petitioners,*

*v.*

FEDERAL TRADE COMMISSION, *et al.*,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, American Air Filter Company, Inc., *et al.*, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 10, 1978.[1] That judgment affirms the enforcement by the United States District Court for the District of Columbia of orders to file special reports issued by the Federal Trade Commission in connection with two statistical reporting programs.

1. For the Court's convenience, a list of the companies joining in this petition is set forth in Addendum A, *infra*.

## Opinions Below

The opinion of the Court of Appeals is not yet officially reported and is set forth in the separately bound Appendix hereto (App. 1-53).[2] The three opinions of the District Court are reported at 432 F. Supp. 274 and 291, and at 1977-2 Trade Cas. ¶72,141 and are also set forth in the Appendix (App. 54-78, 80-118, 121-148).

## Jurisdiction

The judgment of the Court of Appeals was entered on July 10, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## Questions Presented

1. Whether Section 9 of the Census Act as amended to overrule this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), permits a federal agency to compel corporations to answer Census Bureau statistical questions for the purpose of obtaining the same specially compiled information as such corporations submitted to the Census Bureau?

2. Whether a federal agency's decision to undertake a broad-based data collection and publication program, unrelated to any law enforcement or other regulatory proceeding, is subject to the rulemaking procedural requirements

2. The opinion of the Court of Appeals was *per curiam*. The panel was composed of Circuit Judges Bazelon and Spotswood Robinson and District Judge Aubrey Robinson.



of the Administrative Procedure Act, 5 U.S.C. §553, when, according to the agency, the program is designed to achieve important policy goals affecting the structure of the national economy?

3. Whether the Fourth Amendment permits judicial enforcement of agency compulsory process without any evaluation of whether the relevance of the information justifies the burden of compliance imposed on the respondent?

## Constitutional and Statutory Provisions Involved

The following constitutional and statutory provisions, set forth in full in Addendum B, *infra*, are involved in the questions presented by this petition: The Fourth Amendment to the United States Constitution; 13 U.S.C. §9 (Census Act); 5 U.S.C. §§551(4), 553 (Administrative Procedure Act); 15 U.S.C. §46(b) (Federal Trade Commission Act).

## Statement

This case concerns two separate statistical reporting and publication programs that the Federal Trade Commission has lately undertaken. One is the corporate patterns or CPR program, and the other is the annual line of business or LB program Neither program is being conducted to support any specific law enforcement or regulatory activity of the FTC. In each case the corporations required to submit information are selected on the basis of objective statistical criteria and not on the basis of any suspected wrongdoing. The corporate patterns pro-

gram calls for the submission by 1,000 large corporations of information developed specially for the Census Bureau's once-every-five years *Census of Manufactures* on the value of goods shipped by them, classified according to Census Bureau codes. The Commission intends to publish these Census statistics in individual company form and also to use them internally as an economic "data base."[3] The program is strenuously opposed by the Census Bureau and other government agencies because of the clear threat it poses to the national Census system, which is predicated on the confidentiality of individual Census returns. 13 U.S.C. §9.

In the case of the annual line of business program, the Commission intends to publish aggregate statistics concerning the relative profitability of the nation's manufacturing markets, for the stated purpose of influencing investment choices and thus directing how national economic resources are allocated. The Commission is requiring that 450 of the nation's largest manufacturing companies spend millions of dollars annually to recast their financial performance data and report them according to "line of business" categories that have been constructed by the FTC and that are supposed to equate with markets. The Commission on Federal Paperwork and the General Accounting Office, however, have found serious flaws in the FTC's construction of "lines of business," and the GAO has concluded that data aggregated in such classifications would be "unreliable at best, and may be seriously misleading."[4]

3. CPRA. 257. The record references herein to "CPRA." and "LBA." are to pages of the joint appendices filed with the Court of Appeals in the corporate patterns and line of business cases respectively.

4. LBA. 415.



**The Corporate Patterns Report Program**

Every five years the Census Bureau conducts the well-known *Census of Manufactures,* which provides a wealth of information concerning American industry, unavailable anywhere else and vital to governmental and private planners and policymakers and to scholars. This census is conducted pursuant to specific statutory direction. 13 U.S.C. §131. Information for the *Census of Manufactures* (and other censuses) is submitted under the strictest statutory guarantee that each individual corporation's contribution to the aggregate statistics will be kept confidential. 13 U.S.C. §9. The statutory guarantee is reinforced by a Presidential Proclamation of 1929, 46 Stat. 3011, 3012, which in encouraging cooperation with the government's census-takers states that "[t]here need be no fear that any disclosure will be made regarding any individual person or his affairs." As a result of these guarantees, there is a long-standing tradition of cooperation by corporations with the Census Bureau, justifying the reliance necessarily placed on the completeness and accuracy of Census data in the preparation of the great national economic accounts, *i.e.,* the gross national product and others, and in their use in the making of the most important economic policy decisions.[5]

Included in the information that corporations develop especially for and report solely to the Census Bureau as a part of the *Census of Manufactures,* as well as the

5. See affidavits of the current and a former director of the Census Bureau, sworn to on November 1, 1977 and July 13, 1976, respectively, and reprinted in Addendum C, *infra.*

*Annual Survey of Manufactures,* is information concerning "value of shipments." This is a term of art meaning, roughly, the invoice value of goods shipped from each of a company's plants less freight charges, excise taxes, discounts and allowances or, in the case of goods shipped from one plant to another plant of the same company, the value of the goods as measured by their cost. Goods are classified according to five-digit Census Bureau "product class" codes. These codes were specially developed by Census for its surveys because the two-, three- and four-digit codes included in the Standard Industrial Classification Manual published by the Office of Management and Budget are not precise enough for Census purposes.[6]

The Federal Trade Commission has for many years attempted to obtain these specially compiled Census statistics. Barred by Section 9 from obtaining them directly from the Census Bureau, the FTC has tried to subpoena or otherwise compel production of the Census schedules retained by respondent corporations.[7] It was such an effort that led to this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), that retained Census reports were not protected against FTC process. The following year Congress amended Section 9 to specify that no agency of the government "shall require, for any reason," the production of retained copies of Census reports and that such copies "shall be immune from legal process. . . ." 76 Stat. 922.

6. *See* U.S. Bureau of the Census, Census of Manufactures: 1972 Numerical List of Manufactured Products (New (1972) SIC Basis), Series MC72-1.2.

7. *See* FTC v. Orton, 175 F. Supp. 77, *rehearing denied,* 177 F. Supp. 241 (S.D.N.Y. 1959) (prohibiting forced disclosure to FTC of retained Census schedules); FTC v. Dilger, 276 F.2d 739 (7th Cir.), *cert. denied,* 364 U.S. 882 (1960) (same).



The FTC nevertheless decided 12 years later to make the specialized value of shipments data reported to the Census Bureau the core of a broad-scale information gathering and publication program that it called the corporate patterns program. That program was undertaken by the Commission when on December 17, 1974, it authorized compulsory process to obtain from the 1,000 largest domestic manufacturing companies value of shipments information for 1972, the year of the latest *Census of Manufactures,* which the Commission would use for its internal enforcement and regulatory purposes and for ultimate publication to the general public.[8] The FTC's report form tracked the Census questionnaire word for word in defining value of shipments and tracked it also in the use of Census Bureau five-digit product class codes.

The FTC resolution authorizing the program was adopted without any prior opportunity for public participation. On January 22, 1975, the FTC asked the General Accounting Office for clearance under the Federal Reports Act, 44 U.S.C. §3512. At that time the FTC stated that it intended the corporate patterns program to be a continuing one in which the data would be collected "every five years to coincide with the quinquennial *Census of Manufactures.*"[9] It also made known its plan to publish the value of shipments data in a form identifiable by individual company.[10]

When the plans of the Commission were thus disclosed, other government agencies weighed in with strenuous ob-

8. CPRA. 254, 261.

9. CPRA. 259.

10. CPRA. 253.

jections. The Census Bureau and its sister Commerce Department agency, the Bureau of Economic Analysis, protested that the FTC program would have a serious adverse impact on the quality of Census data.[11] (The Bureau of Economic Analysis is critically dependent on Census data, using them for its calculation of the gross national product and the other national economic accounts.[12]) The Secretary of Commerce himself objected that the Commission was proposing to "circumvent the provisions of Title 13, United States Code, regarding confidentiality of individual firm data."[13] The Office of Management and Budget seconded these objections in strong terms.[14]

The GAO itself finally said that, although "it is evident that the information you are seeking duplicates data already collected by the Bureau of the Census," it did not construe the Federal Reports Act as authorizing it to deny a clearance.[15] Thereafter, without affording any opportunity for a public expression of views, the FTC served identical orders on more than 1,000 corporations in September 1975 requiring each of them to complete and file a corporate patterns report that would set forth its value of shipments data. Motions to quash were filed with the Commission by 390 of the companies and denied in December 1975.[16]

In its denial statement, the Commission acknowledged that "many of the items of data called for will have been developed and known to the companies in connection with their completion of census reports," but it asserted that the corporate patterns program did not violate the Census Act because it did not explicitly "require that copies of the Census returns be produced."[17] However, while purporting not to "require" the actual copies of Census reports, the Commission took pains to point out to respondents that the information sought by the Commission was readily available to them on their carbon or photocopy of the Census reports, and it invited the respondents simply to copy the numbers from their file copies onto their CPR forms.[18] This invitation was reiterated by the Commission in a follow-up letter to each CPR respondent, again suggesting that the respondent copy the numbers on the file copies of its Census form onto the FTC's CPR form and furnishing explicit instructions for doing this.[19]

11. CPRA. 274, 270.

12. See affidavits of Census Bureau directors, Addendum C, *infra*, pp. C1-C4, C5-C13.

13. CPRA. 452.

14. OMB stated:

> It is our view and that of the Commerce agencies that Congress spoke most definitely on the subject of disclosing such data when it passed and later amended the Census law (title 13, United States Code, section 9), in which such disclosure of responses in identifiable form and subpoena of company file copies of Census reports is forbidden. The present situation is not unlike that in 1961 in which the FTC subpoenaed the copy of a Census report retained in the files of the St. Regis Paper Company. The congressional reaction in that instance was both swift and unambiguous; in 1962 they amended the Census law to provide immunity from legal process for the retained file copies of their reports. The CPR, to be conducted on a mandatory basis, is tantamount to the same thing and will be viewed by the respondent as a subterfuge to obtain Census data. [CPRA. 290-91.]

15. CPRA. 777.

16. CPRA. 455.

17. CPRA. 464, 477.

18. CPRA. 467 n. 12.

19. CPRA. 335.

### The Annual Line of Business Program

The annual line of business program was promoted at the time of its inception as nothing less than a vehicle by which to achieve a reallocation of national economic resources and a restructuring of American industry.[20]

Under the program, the Commission plans to obtain profit-and-loss and balance-sheet data from a substantial number of the nation's largest and most diversified manufacturing companies, about 450 of them, broken down by lines of business. The survey is to be repeated annually, resulting in the publication of line of business statistical reports every year.

The FTC has established 260 line of business categories for purposes of the program. Because manufacturing corporations are not organized in the way the FTC's line of business categories assume, the Commission's reporting rules include detailed instructions for recasting the financial data they prepare in the ordinary course of business so that the numbers can be assigned to FTC line of business categories. The uniformity that it is hoped thus to achieve is, in the Commission's view, essential to the usefulness of aggregate line of business statistics. As the Court of Appeals said, "the key feature of the survey is its requirement that each company present its financial performance statistics in terms of a uniform set of market categories." (App. 9.)

20. LBA. 308, 435, 715.



After the line of business data submitted by individual companies are aggregated into category totals by FTC staff, the aggregate figures are to be published and will purportedly reveal, *inter alia,* sales, costs, assets, and profits for the nation's manufacturing markets. These aggregate statistics are then to be used by investors, competitors, and other groups in the private sector as a basis for allocating capital resources, and the Commission itself plans to use these data to determine what national markets should be subjected to industry-wide antitrust investigations. (App. 10.) The unaggregated individual company data received by the FTC are supposed to be sequestered from use in connection with any FTC law enforcement investigation or adjudication.

The kind of "segment" financial reporting that the line of business program involves had its genesis in 1970 when the Securities and Exchange Commission amended its reporting regulations, after a rulemaking proceeding comporting with 5 U.S.C. §553, to require limited segment financial data to be included in 10-K reports filed annually by corporations with the SEC. The FTC initiated its own program in 1973 after it was unable to persuade the SEC to require that segment data be reported on the basis of a uniform system of line of business categories.[21]

21. LBA. 331-32, 2014. The authoritative Financial Accounting Standards Board has recently issued a new accounting standard requiring corporations, commencing with fiscal year 1977, to report financial data for their business segments in public financial statements such as annual reports to shareholders. LBA. 1948. But like the SEC, the FASB determined that it would be inappropriate to impose a uniform category system; instead, corporations are required to define lines of business in a manner consistent with how they are actually organized to do business.

It is the view of numerous experts in the fields of accounting and economics that the Commission's line of business program is seriously flawed in concept and design.[22] Moreover, the General Accounting Office, after evaluating the program pursuant to the Federal Reports Act, 44 U.S.C. §3512, found that the aggregated LB data will be "unreliable at best, and may be seriously misleading" and expressed reservations "as to whether any meaningful hypotheses could be tested by the data developed by the line-of-business program."[23] After conducting its own review in 1977, the Commission on Federal Paperwork echoed these findings in calling for "a complete reexamination" of the program.[24]

A principal criticism is that virtually each one of the 260 purported "market categories," into which companies must recast their data, encompasses numerous heterogeneous products. For example, a typical FTC category includes, *inter alia,* "ammonia applicators," "farm tractors" and "windmills." Another includes "manhole covers" and "window sills." Such categories on their face are not "markets." *See Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962). Further, these data will exclude statistics from major segments of every "line of business," namely, all medium and small firms and all foreign imports.[25] Hence, forcing domestic companies at

22. LBA. 633, 652, 680, 500, 506, 507, 1435.

23. LBA. 415, 801.

24. A Report of the Commission on Federal Paperwork: Segmented Financial Reporting 3 (June 10, 1977). LBA. 1704.

25. LBA. 864. In many U.S. industries, *e.g.,* steel, automobiles and electronics, imports are a major element of competition and market structure.



great expense to recast their financial data to fit such defective classifications will accomplish little but burden. The program will result in the public dissemination of data falsely portrayed as market facts. But, once these unreliable data are aggregated and published for use inside and outside government, there will be no opportunity —as there would be in the ordinary case of, for example, data subpoenaed in connection with an enforcement proceeding—for an affected company to disprove their worth in an evidentiary setting.

The program's fundamental defects reflect the fact that the Commission has refused, over repeated objections since 1973, to follow the informal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. §553). The FTC made its final decision to adopt and pursue the line of business program on March 26, 1974. On the same date it said that, if requested, it would hold hearings the following year "[w]ith the understanding that the Commission would be receptive only to improving the quality of the data received and that the basic concept of LOB reporting [would] not [be] open to question . . . ."[26]

On August 2, 1974, after receiving from the GAO a highly qualified and limited clearance of the initial line of business report form under the Federal Reports Act, the Commission issued orders to approximately 350 corporations requiring them to complete the form for the 1973 reporting year. More than 200 corporations moved to quash these orders. These motions were denied by the Commission in January 1975.

26. LBA. 990. These limited hearings were held in May, 1975.

In the course of early litigation over the program, the United States District Court for the District of Delaware ruled that there appeared to be merit to the claim that the program was invalid for failure to follow prescribed rulemaking procedures. *A. O. Smith Corp.* v. *FTC,* 396 F. Supp. 1108, 1125 (D. Del. 1975), *rev'd on other grounds,* 530 F.2d 515 (3d Cir. 1976). The Commission thereafter, in April 1975, invited comments on proposed technical revisions to the report form and accompanying instructions for subsequent reporting years. Again, however, it made clear that it was not interested in comments on whether there should be any line of business program at all or whether the Commission's basic approach was sound. In August, 1975, after adopting with slight modifications the revisions it had proposed and after obtaining GAO clearance of the revised report form, the Commission issued its second cycle of line of business orders to some 450 corporations requiring them to file reports for their 1974 fiscal years. After rejecting motions to quash these 1974 orders, the Commission withdrew its then still pending 1973 orders. It has since issued additional orders for the 1975 and 1976 reporting years, which are outstanding.

**The Litigation**

The corporate patterns and line of business programs are distinct and have been litigated in separate sets of consolidated proceedings. There have been a number of different actions in several different courts. Eventually, all cases involving each of the two programs were effectively consolidated in the District Court for the District of Columbia. (App. 7 n.1.) The cases include both preenforcement review actions instituted by corporations subject to the programs and FTC actions to enforce its compulsory process.



In its single opinion affirming the District Court's judgments enforcing both the corporate patterns and line of business orders, the Court of Appeals, among other things, rejected the argument of these petitioners that the FTC's demand for value of shipments data developed specially for the *Census of Manufactures* and provided to the Census Bureau violated the confidentiality guarantee of the amended Section 9 of the Census Act. The court professed first to read the statute literally as encompassing only the piece of paper in a company's files that is the duplicate copy of what was submitted to Census. (App. 25.) But then it went beyond the literal terms of the statute to draw a distinction between asking the same question as Census, which the FTC concededly did here and which, in the court's view, an agency may do, and demanding the same answer, which the court said may not be done but which the FTC claimed not to have done. Although the FTC was asking respondents to answer a question "essentially identical" to the question posed by the Census Bureau and was seeking and expecting to get the same answers previously given to the Census Bureau, the court ruled that the FTC had not violated the Census Act because it had not literally demanded that the answers given to the FTC be precisely identical. (App. 30-31.)

The court also rejected petitioners' claim that before it adopted either program the FTC was required to follow the rulemaking procedures prescribed by 5 U.S.C. §553.

The court held that neither program was a "rule" within the meaning of the Administrative Procedure Act and that information gathering is an agency activity that is necessarily separate from rulemaking and adjudication. (App. 17-21, 18 n.48.) Finally, in upholding the District Court's enforcement of the line of business orders as routine compulsory process, the court expressly endorsed the District Court's refusal to undertake any evaluation of whether the relevance of the data to be collected by the line of business orders to the Commission's purposes justified the concededly substantial burden of compliance. (App. 35-38.)

The reporting requirements were stayed pending the Court of Appeals' decision. In the case of the corporate patterns program, after the District Court and the Court of Appeals denied a stay pending appeal, such a stay was granted by Mr. Justice Brennan.[27] In the case of the line of business program, the FTC itself repeatedly extended the compliance deadline until the Court of Appeals finally entered a formal stay order.

## Reasons for Granting the Writ

### I. The Census Act Question

The amended Section 9 of the Census Act provides: "No . . . agency . . . of the Government [except the Census Bureau itself] . . . shall require, for any reason, copies of census reports which have been retained by [any particular] establishment or individual," and provides further: "Copies of census reports which have been so retained shall be immune from legal process. . . ." 13 U.S.C. §9. The

27. Order, Nos. A-370 and A-389 (Nov. 7, 1977).



question whether, despite this clear guarantee of confidentiality of retained Census data, another federal agency may require the production of data specially developed for and submitted to the Census Bureau is an important question of federal law that has not been and should be decided by this Court.

The decision of the court below was that, when the FTC does not in terms seek from a corporation the file copy of its *Census of Manufactures* submission to the Census Bureau but asks for substantially what is recorded thereon, the FTC may obtain the information that the file copy would disclose. That is a crabbed reading of Section 9 that gives no effect to the policy that lay behind its amendment in 1962.

The amendment was of course prompted by this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1962). There a majority of the Court had held that the unamended Section 9, which did not include the language quoted above concerning copies but which guaranteed confidentiality of Census submissions and their containment within the Census Bureau, did not preclude the FTC from subpoenaing a file copy of a corporation's value of shipments submission.

Congress acted within less than a year to correct what it obviously considered a mistakenly narrow construction of its confidentiality guarantee, a construction that could have deleterious effects on the vital accuracy and completeness of Census data. In amending Section 9, Congress placed heavy reliance on the dissenting opinion of Mr. Justice Black in the *St. Regis* case. S. Rep. No. 2218, 87th

Cong., 2d Sess. 2 (1962); H. R. Rep. No. 2437, 87th Cong., 2d Sess. 2 (1962). Joined by Mr. Justice Whittaker and Mr. Justice Stewart, Mr. Justice Black had said:

> Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government. [368 U.S. at 229.]

It was the dissent's generous view of the government's promise that Congress sought to restore in amending Section 9 to protect specifically file copies retained by Census respondents. S. Rep. No. 2218, *supra*, at 2; H.R. Rep. No. 2437, *supra*, at 2.

The Court of Appeals' decision runs squarely counter to this Congressional purpose. The court initially seemed willing to base its decision on the literal language of Section 9 without more, taking substantially the same tack as the majority of this Court had in the *St. Regis* case. It said that the language of the amended provision "unambiguously protects actual file copies of census reports retained by corporations" and that a construction of the statute that would encompass the Census-defined and specially compiled value of shipments data sought by the FTC "extends so far beyond the statute's plain terms that we might fairly reject it without further inquiry." (App. 25.)

But the court did undertake further inquiry and made clear in the course of it that the literal language of the statute as the court read it did not by any means answer



all questions that might arise under it. The court acknowledged that, even though no "actual file cop[y]" was sought, an agency could not ask of a Census respondent the same question that had been put to it by Census if the question demanded an answer identical to that furnished to Census. (App. 28-30.) The court believed that, though the FTC was putting an identical question,[28] an identical answer was not required, apparently because with the passage of time since the Census data were submitted more complete or accurate information might be available. (App. 29-31.)

We submit that, if the fact that data prepared specially for confidential submission to the Census may be subject to correction is enough to allow another agency to obtain such data, then the amended Section 9 is no barrier at all, let alone the guarantee it was meant to be that the government's promise of confidentiality would be faithfully kept, without "picayunish haggling."

Of course, underlying business records do not become immune from governmental process when they are used to prepare a Census report. The responsible Congressional committees acted to ensure against that unwarranted result by deleting from the 1962 legislation language that in its breadth might have had that effect. H. R. Rep. No. 2437,

28. The FTC's question differed only in that (1) it required that the plant-by-plant data given to Census be summed to company-wide totals and (2) the FTC asked that shipments be classified according to the five-digit codes adopted by the Census Bureau in 1972 whereas the desired Census responses for most companies were in terms of previous 1967 Census codes. This presented no real difference, however, since the Census Bureau had itself converted the responses of the companies to the new codes and had set these numbers forth on the Census forms it sent to them in 1973. (App. 23.) It was these converted numbers appearing on the 1973 Census form that the FTC specifically invited respondents to sum into corporate totals and copy onto their corporate patterns questionnaires. (CPRA. 335.)

*supra,* at 1-2. But it is clear at the same time that, more than just a piece of paper on which information is written, the "information furnished" to the Census Bureau, in the specialized form furnished, was intended to be immune. *Id.* at 2-3. The FTC has effectively acknowledged that it was just this Census-defined information that it sought when it wrote to respondents to remind them that they could copy the data off of their copies of Census reports in responding to the FTC's CPR questionnaire (pp. 9 & n.28, *supra*).

The question posed by the Court of Appeals' decision is important not only doctrinally, as a test of whether a correction of what Congress perceived as a judicial error in the construction of a statute is to be received grudgingly or hospitably, but also practically. The record, which includes the affidavits of two successive directors of the Bureau of the Census (Addendum C, *infra*), demonstrates that the Court of Appeals' decision, if allowed to stand, will cause companies to reconsider their willing cooperation with Census. The result is likely to be a serious deterioration in the quality of data that Census collects under both its mandatory and voluntary programs, and any such deterioration will impair the ability of the government to deal rationally with basic economic problems confronting the nation.

The Secretary of Commerce has said in a letter on file here, in connection with the stay application (p. 16, *supra*), that this litigation raises "very important issues of public policy."[29] If the decision of the court below is left standing, its narrow construction of the *St. Regis* amendment

29. No. A-370, letter of Hon. Juanita M. Kreps (Nov. 2, 1977).



would mean that Congress accomplished nothing of substance in amending the Census Act. The issue of confidentiality of Census material merits this Court's plenary consideration.

### II. The Administrative Procedure Act Question

Good, bad or indifferent, the corporate patterns and line of business programs are important, innovative programs of the Federal Trade Commission. In fact, the Chairman of the FTC has described the line of business program as the Commission's "most important single economic activity."[30] Both programs are free-standing information-gathering and publication undertakings, unrelated to any adjudicatory or other regulatory proceedings.

There are serious questions as to the worth of both programs, the soundness of the bases on which the Commission proposed to proceed and the way it plans to proceed. We have just noted the expressed concerns of other agencies as to the very gathering of Census data in the corporate patterns program. We have also noted the concerns of experts and of the GAO and the Paperwork Commission that the line of business program is seriously flawed conceptually and in its design. There is the most serious question whether the resulting data will be worth the substantial costs required to generate them and, indeed, whether the program is not likely to do more harm than good.

The FTC did not by a notice of proposed rulemaking throw its proposal open to criticism such as this, stating its

30. LBA. 706.

tentative views and inviting the views of others; it established no proceeding in which critical views could be received and explained; it did not force itself to undergo the discipline, so supremely conducive to rational decision-making, of dealing with the criticisms and explaining the basis and purpose of the program it adopted. The question whether these informal rulemaking procedures of 5 U.S.C. §553 should have been invoked before the Commission proceeded with either of the programs is an important one. This Court in recent decisions has laid heavy emphasis on Section 553 as the sum of Congress' prescription of procedural requirements in rulemaking. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* Nos. 76-419 and 76-528, decided April 3, 1978; *United States* v. *Florida East Coast Ry.,* 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972). A corrollary of the Court's insistence in the cited cases that courts may not impose on agencies more exacting procedural requirements than are set forth in the APA is surely that courts must insist that the minimal APA procedures be followed in all those cases to which Section 553 applies.

We believe that, contrary to the judgment below, each of the programs in issue is a rule within the APA definition of that term, 5 U.S.C. §551(4), and that therefore Section 553 does apply. Section 551(4) defines a rule as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency



and as including:

> the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

"Rule making" is defined as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. §551(5). Section 553 governs (with some exceptions not pertinent here) "rule making" as so defined.

The Commission has denied the applicability of Section 553 to any exercise of its power under Section 6 of the Federal Trade Commission Act to investigate and gather information. The court below agreed. The court first found that nothing in Section 6 itself required the observance of APA rulemaking procedures. (App. 15-17.) This is not surprising in a statute that dates from 1914; the statutory provision enacted in 1946 as Section 4 of the APA (codified as 5 U.S.C. §553) laid new demands on all agencies and brought about the reform of rulemaking procedures throughout government. Then, looking at least to the right place, the court found that what the Commission was doing should be regarded as investigation and not as rulemaking or adjudication under the APA. (App. 17-21.) It quoted a remark of one sponsor of the APA, Rep. Walter, who did indeed seem to divide the compulsory powers of administrative agencies into three categories: legislative (rulemaking), judicial (adjudication) and investigation. (App. 19-20.) But Congressman Walter also said that the power of investigation or compulsory process "may be incidental to either legislative or judicial powers

of administrative agencies, or it may be entirely independent of either." *(Id.)* The Congressman did not mean that, any time information gathering is a part of an agency program, that program is neither legislative (rulemaking) nor judicial (adjudication). If he did, this Court has effectively rejected his view. The dispute over whether rulemaking procedures should have been followed or adjudication was sufficient, which divided the Court in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), concerned an exercise in information gathering, a requirement that an employer furnish a list of names and addresses of its employees.

The Commission itself has described the line of business program as legislative or quasi-legislative in nature.[31] The program is an integrated data collection and dissemination program. It is an attempt by the Commission at "regulation by publicity" or "regulation through public dissemination of the full and complete facts," which were the Commission's own descriptions of a much more limited data collection and publication program as quoted by this Court 50 years ago. *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 169 (1927). Publication of the data is the *raison d'etre* of the program. Unless the data are published, the Commission cannot hope to achieve its legislative goal of improving industry's competitive performance. That is the stated policy objective of the program, adopted pursuant to the laws that the Commission administers, the Federal Trade Commission Act and the Clayton Act. The

31. LBA. 1502.



program is plainly designed to implement or prescribe law or policy and thus falls within Section 551(4).[32]

The attempt to reduce the program to a process of simple information-gathering or investigation, divorced from the proposed publication of the data with its overall regulatory purpose, is largely the work of Commission counsel in a litigation context. The attempt brings to mind this Court's admonition in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 246 (1972), where it found it impossible to sustain a Commission order (even though it agreed with the Commission on the law) because "[t]he difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinning of its order." *See also Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962). There is no single opinion of the Commission in either of these cases—for the very reason that it declined to proceed under a statute that, among other things, would have required it to set forth the bases and purposes of the programs. Its reasons for adopting the programs, however, were expressed in a series of public statements by the Commission or its mem-

32. In what has been said immediately above we have used the line of business program as our textual example, but what is said applies also to the corporate patterns program. There is a particular additional reason why the line of business program fits the APA definition of a rule. That definition covers as a specific instance of a rule the prescription for the future of accounting or practices bearing thereon. The line of business program demands of those companies subject to its requirements novel breakdowns of financial data. The detailed accounting rules prescribed by the Commission for making the breakdowns and ensuring the uniformity of the data reported are foreign to the companies affected. They will have to make significant changes in or additions to their accounting practices to meet their annual obligations under the program. LBA. 1010. The result is, despite the contrary protestations of the Commission and the court below, an effective prescription of accounting or practices bearing thereon.

bers—including the testimony of the Chairman describing the line of business program as the Commission's single most important economic activity. Agency undertakings with purposes as comprehensive and ambitious as those claimed for these programs are a far cry from counsel's equation of the FTC's actions with the simple issuance of compulsory process in an enforcement case.

When the Federal Power Commission proposed to require natural gas companies for the first time to submit detailed information about their natural gas reserves, it apparently recognized that it was implementing or prescribing law or policy, and it published a notice of proposed rulemaking and received written and oral comments before adopting a reporting requirement. On review, the Court of Appeals said that "[p]resumably the Commission felt, properly, we think, that its procedure in this case was governed by the 'Rulemaking' section of [the Administrative Procedure] Act, 5 U.S.C. §553." *Union Oil Co.* v. *FPC*, 542 F.2d 1036, 1039 (9th Cir. 1976). The FTC here had all the more reason in these cases to think that its procedures should have been governed by Section 553.

At the very least, the question presented here is novel as well as important: whether, when an agency sets out to make policy by means of an exercise of agency process unconnected to any ancillary agency proceeding, its action is any the less subject to the procedural requirements of Section 553 than it would be if the agency chose a more orthodox regulatory approach.

### III. The Scope of Review Question

If the Court were to decide the second question presented in favor of these petitioners, the Commission would



be required to conduct rulemaking proceedings that could reasonably be expected to result in administrative records suitable for any further judicial review. There were no such defined administrative records in the cases as they were actually heard below. In the absence of a record, there was no effective review. The District Court, sustained in this by the Court of Appeals (App. 31-32), went so far as to hold that the FTC's production orders were not agency action at all within the meaning of the Administrative Procedure Act and thus not even subject to review according to the APA standards set forth in 5 U.S.C. §706. The courts below thus held that there need not be even the minimal inquiry as to the rationality and basis for the programs that is commanded by Section 706(2)(A), with its requirement that a reviewing court set aside agency action "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." *See Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

More than that—and this is the basis of the third important question petitioners present, pertaining to the line of business orders—the courts below did not subject the FTC's orders even to the minimal scrutiny that the Fourth Amendment requires when judicial enforcement of any agency subpoena or other process is requested.

Apart from anything else, review by this Court of that ruling is essential because it will otherwise stand as authority for the exercise of a general warrant power by the FTC —a power that the Fourth Amendment places beyond the pale of permissible Congressional delegation. *Marshall* v. *Barlow's, Inc.*, No. 76-1143, decided May 23, 1978; *FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924).

In an unbroken line of cases, this Court has emphasized that the issues of the relevance and burdensomeness of agency process, and the role of the judiciary in determining those issues, are "neither minor nor ministerial." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 217 n.57 (1946).[33] Resolution of the issues requires, among other things, a careful evaluation of how relevant the information demanded is to the purposes articulated by the agency in support of its incursion into private business records compared with the burden that the incursion places on the business proprietors. No such balancing took place with respect to the line of business program, despite the open acknowledgment by the lower courts that (a) the burden of compliance would run into hundreds of thousands of dollars annually for some respondents (App. 138-39), and (b) the information that would be produced may or may not be useful in effectuating the kind of educational regulatory endeavor which the line of business program represents (App. 19 n. 48, 36 n.102, 130).[34]

The Court of Appeals tersely stated that "appellants have failed to persuade us that the District Court erred in its refusal to disregard the long and consistent line of

33. *See also* See v. City of Seattle, 387 U.S. 511 (1967); United States v. Morton Salt Co., 338 U.S. 632 (1950); FTC v. Claire Furnace Co., 274 U.S. 160 (1927); FTC v. American Tobacco Co., 264 U.S. 298 (1924); Hale v. Henkel, 201 U.S. 43 (1905).

34. The most that the District Court was able to conclude was that the information to be produced would not be "totally useless." (App. 130.) It was only on the basis of applying this far too lenient standard that the District Court determined not to take and hear evidence on the issue of relevance and to grant summary judgment for the Commission. (*Id.*) The Court of Appeals, while purporting to apply the higher standard of "reasonable relevance," ignored the fact that in so doing it revitalized a hotly disputed issue of fact precluding judgment under Rule 56. (App. 36.)



authority supporting independent consideration of relevance and burdensomeness." (App. 37-38.) Yet, this Court in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967), stated very clearly the "settled" rule that the court below refused to follow:

> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, *relevant in purpose*, and specific in directive *so that compliance will not be unreasonably burdensome.* [Emphasis supplied.][35]

It is only by measuring the burden of a demand for private business information against the relevance of that information to the agency's purpose that a court can evaluate the "reasonableness" of the agency's process in a meaningful way, as required by the Fourth Amendment. Otherwise, demands costing business enterprises (and, ultimately, consumers) millions of dollars but yielding data of at best marginal relevance could be routinely enforced, and in the words of the dissenting members of the *en banc* panel of the Court of Appeals in *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 905 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977), "the Federal Trade Commission—or any other of our regulatory agencies—would speedily metamorpho-

35. *See also* Hale v. Henkel, *supra*, 201 U.S. at 76-77; FTC v. Baltimore Grain Co., 284 F. 886, 889-90 (D. Md. 1922), *aff'd per curiam*, 267 U.S. 587 (1925). The only decisions of this Court cited by the court below as purportedly establishing a contrary "long and consistent line of authority" were United States v. Morton Salt Co., *supra*, and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). A reading of these cases, however, shows clearly that they do not support the Court of Appeals' statement that the issues of burden and relevance are unrelated and must be determined separately.

size into the 'Roving Commission.'" This Court should act to ensure that agency process is subjected to the meaningful judicial scrutiny required by the Fourth Amendment.

## Conclusion

The petition should be granted.

Respectfully submitted,

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# ADDENDA

## ADDENDUM A

### List of Petitioners

A. E. Staley Manufacturing Co.
Air Products and Chemicals, Incorporated
Allegheny Ludlum Industries, Inc.
Aluminum Company of America
Ambac Industries, Incorporated
American Air Filter Company, Inc.
American Can Company
American Cyanamid Company
American Greetings Corporation
American Home Products Corporation
American Maize-Products Company
American Stores Company
Anchor Hocking Corporation
Anheuser-Busch, Inc.
A. O. Smith Corporation
Archer-Daniels-Midland Co.
Armco Steel Corporation
Armstrong Cork Company
Asarco Incorporated
Ashland Oil, Inc.
Atlantic Richfield Company
The Babcock & Wilcox Company
E. T. Barwick Industries, Inc.
The Bendix Corporation
Bethlehem Steel Corporation
The Black and Decker Manufacturing Company
The Boeing Company
Bristol-Myers Company
Brockway Glass Company, Inc.
Brown Group, Inc.
Campbell Soup Company
Carnation Company
Carpenter Technology Corporation

*Addendum A*

The Carrier Corporation
Caterpillar Tractor Co.
The Ceco Corporation
Celanese Corporation
Champion Home Builders Company
Chemetron Corporation
Chrysler Corporation
Cincinnati Milacron, Inc.
C.I.T. Financial Corporation
Cities Service Company
City Investing Company
The Coca-Cola Company
Cone Mills Corporation
Congoleum Corporation
Consolidated Foods Corp.
Continental Group, Inc.
Cooper Industries, Inc.
CPC International, Inc.
Crane Company
Dairylea Cooperative, Inc.
Dean Foods Company
Del Monte Corporation
Diamond International Corporation
Diamond Shamrock Corporation
Digital Equipment Corporation
Dover Corporation
The Dow Chemical Company
E. I. du Pont de Nemours and Company
Eagle-Picher Industries, Inc.
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Emery Industries, Inc.
Exxon Corporation
Faberge, Incorporated



*Addendum A*

Fairmont Foods Company
Fedders Corporation
The Firestone Tire & Rubber Company
FMC Corp.
Food Fair Stores, Inc.
Ford Motor Company
Fuqua Industries, Inc.
GAF Corporation
General Electric Company
General Mills, Inc.
General Motors Corporation
General Telephone & Electronics Corp.
The General Tire & Rubber Co.
Gerber Products Company
The B. F. Goodrich Company
Gulf & Western Industries, Inc.
Gulf Oil Corporation
Hallmark Cards, Incorporated
Handy & Harman
Harnischfeger Corporation
Harris Corporation
H. J. Heinz Company
Hershey Foods Corporation
Heublein, Inc.
Hoffmann-La Roche Inc.
Honeywell Inc.
Household Finance Corp.
Howmet Corporation
Hudson Pulp & Paper Corp.
Hughes Tool Company
ICI Americas, Inc.
Ingersoll-Rand Company
Inland Container Corporation
Inland Steel Company
International Business Machines Corporation

*Addendum A*

International Harvester Company
International Paper Company
Jim Walter Corporation
Johns-Manville Corporation
Johnson & Johnson
Kaiser Aluminum & Chemical Corporation
Kane Miller Corporation
Kellogg Company
Kellwood Company
Kimberly-Clark Corporation
Kirsch Company
Kohler Co.
Koppers Company, Inc.
Kraft, Inc.
Lear Siegler, Inc.
Lehigh Portland Cement Company
Leviton Manufacturing Company, Incorporated
Litton Industries, Inc.
Loews Corporation
Lone Star Industries, Inc.
The Marley Company
Martin Marietta Corp.
Mattel, Inc.
McGraw-Edison Co.
Mead Corporation
Miles Laboratories, Inc.
Mine Safety Appliances Company
Minnesota Mining & Manufacturing Company
Monsanto Company
Motorola, Inc.
The Murray Ohio Manufacturing Co.
Nabisco, Inc.
National Can Corporation
National Gypsum Company
NL Industries Incorporated



*Addendum A*

Northwest Industries, Inc.
Norton Simon, Inc.
Occidental Petroleum Corporation
The Ohio Brass Company
Olin Corp.
Oscar Mayer & Co., Inc.
Outboard Marine Corporation
Overhead Door Corporation
Owens-Illinois, Inc.
Oxford Industries, Inc.
Paccar Inc.
Pepsico, Inc.
Phillips Petroleum Company
Pittsburgh Forgings Company
Polaroid Corporation
PPG Industries, Inc.
The Procter & Gamble Company
Raytheon Company
Reliance Electric Company
Republic Steel Corporation
Revlon, Inc.
Rexnord, Inc.
R. J. Reynolds Industries, Inc.
Reynolds Metals Company
Rhinechem Corporation
Rockwell International Corp.
Rorer-Amchem, Incorporated
Rubbermaid Incorporated
Safeway Stores, Incorporated
SCM Corporation
The Scott & Fetzer Company
Scott Paper Company
Shell Oil Company
The Sherwin-Williams Company
Simplicity Pattern Co., Inc.

*Addendum A*

Simpson Timber Company
The Sperry and Hutchinson Company
Sperry Rand Corporation
Standard Brands Incorporated
Standard Oil Company of California
Standard Oil Company (Indiana)
Standard Pressed Steel Co.
Sterling Drug, Inc.
Sunbeam Corporation
Sundstrand Corporation
The Tappan Company
Texas Instruments, Inc.
Thiokol Corporation
Thomas J. Lipton, Inc.
Time Incorporated
The Times Mirror Company
Timex Corporation
The Timken Company
The Trane Company
TRW Inc.
Union Carbide Corporation
United Brands Co.
United States Filter Corporation
United States Gypsum Co.
United States Steel Corporation
USM Corporation
Warner Communications, Inc.
Westinghouse Electric Corporation
West Point-Pepperell, Inc.
Wheelabrator-Frye Inc.
White Consolidated Industries, Inc.
Whittaker Corporation
W. R. Grace & Co.
Wyman-Gordon Company



## ADDENDUM B

## Constitutional and Statutory Provisions Involved

### The Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### 13 U.S.C. §9 (Census Act)

Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which

have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

**5 U.S.C. §§551(4), 553 (Administrative Procedure Act)**

**§551(4)**

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

**§553**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.



(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted

a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

**15 U.S.C. §46(b) (Federal Trade Commission Act)**

That the commission shall also have power—

• • •

(b) to require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the



commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

## ADDENDUM C

## Affidavit of Manuel D. Plotkin Sworn to November 1, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

*In re* FTC CORPORATE PATTERNS )
REPORT LITIGATION ) No. A-370

County of Prince George's )
State of Maryland ) ss

I, MANUEL D. PLOTKIN, being duly sworn, hereby depose and say as follows:

1. I am the Director of the Bureau of the Census, Department of Commerce. I have been the Director since I was confirmed by the Senate on May 13, 1977. I make this affidavit based upon personal knowledge and on information available to me in my official capacity.

2. The purpose of this affidavit is to present information as Director of the Bureau of the Census with respect to consideration by this Court of the stay of the District Court's July 15, 1977 enforcement order pending review by the Court of Appeals. The Bureau of the Census strongly favors continuation of the Court's stay of the District Court's order because of the adverse effect that denial of a stay could have on the integrity, completeness, and timeliness of national statistical programs, both voluntary and mandatory.

3. Even in mandatory programs, the accuracy and completeness of census data are dependent upon the goodwill and cooperation of respondents. The Census Bureau has developed a high degree of such cooperation because respondents are confident that information supplied the Census Bureau will be handled on a confidential basis and will be used solely for statistical purposes.

4. An example of a mandatory program that could be adversely affected by denial of a stay in this case is the Bureau of Census' five-year economic benchmark census. The Bureau is in the final stages of preparation of its major 5-year economic benchmark censuses. Within the next 60 days, report forms will be mailed to more than 2½ million establishments, including all establishments of the plaintiff companies, requesting information for the year 1977. Since the economic censuses use the "establishment" as a reporting entity, many of the requested data items are not readily available in the accounting records of multiestablishment companies. These data items involve unique statistical concepts, and I know of no accepted accounting standards which would require companies to maintain such records. Accordingly, respondents must make estimates of reported information, such as the value of interplant transfers at full economic value.

5. If a stay were denied and companies were requested to file such data with the FTC, many firms might



decline to submit information based on estimates (as they have in the past) for fear that such data would be used for other than statistical purposes. Rather, firms might restrict their reporting to data that can be substantiated from book records, an alternative that is legally permissible. The result would be the submission of less reliable and useful statistical data to the Census Bureau.

6. The impact could be even greater with respect to voluntary programs. The Bureau of the Census is dependent on the voluntary cooperation of American industry in the conduct of numerous surveys that provide important economic indicators. These surveys include the monthly Manufacturers' Shipments, Inventories, and Orders Survey, the weekly and monthly Retail Sales Surveys and numerous monthly and quarterly Current Industrial Reports. Enforcement of the District Court's order pending appeal could reduce the willingness of firms to cooperate with many of the Bureau of the Census' important statistical programs in which information is reported on a voluntary basis.

7. Denial of a stay would have the impact described above on the Census Bureau and various of its statistical programs. It would also affect users of Census data within the government. For example, it could affect the updating of numerous Federal statistical series, such as the Gross National Product accounts prepared by the Bureau of Economic Analysis, another agency of the Department of

Commerce, the Wholesale Price Index, prepared by the Bureau of Labor Statistics, and the Index of Industrial Production prepared by the Federal Reserve Board. In addition, the Census of Manufactures data are widely used by other government agencies such as the Council of Economic Advisers, the Departments of Energy and Treasury in analytical studies of specific industries, products, materials, or fuels consumed.

8. In short, my major concern is that denial of the stay at this crucial time would irreparably harm both the 1977 Economic Censuses and important voluntary economic surveys. This concern is similar to that expressed by former Census Director, Vincent P. Barabba, in an affidavit filed in District Court.* For these reasons, the Bureau of the Census strongly favors the issuance of a stay pending a decision on the merits by the Court of Appeals.

/s/ MANUEL D. PLOTKIN

MANUEL D. PLOTKIN

Subscribed and sworn to before me
this 1st day of November, 1977.

/s/ IRENE C. STEWART

Notary Public

My commission expires July 1, 1978.

* See Exhibit A to Applicants' Application for a Stay of An Order of the District Court for the District of Columbia.



**Affidavit of Vincent P. Barabba**
**Sworn to July 13, 1976**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil No. 76-1117

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,
*Plaintiffs,*

*v.*

FEDERAL TRADE COMMISSION, *et al.*,
*Defendants.*

State of Maryland )
County of Prince George's ) ss

I, VINCENT P. BARABBA, being duly sworn, hereby depose and say as follows:

1. I am the Director, Bureau of the Census, Department of Commerce. I have been the Director since I was confirmed by the Senate on August 13, 1973. I make this affidavit based upon personal knowledge and on information and belief available to me in my official capacity.

2. The purpose of this statement is to identify my position as Director of the Bureau of the Census with respect to the Federal Trade Commission's

Corporate Patterns Report. The Bureau strongly opposes this survey since in our judgment it may unnecessarily compromise the confidentiality of data furnished the Bureau pursuant to title 13, United States Code, by requesting similar information which the Federal Trade Commission (FTC) plans to publish in identifiable form. This duplication of reporting and possible publication not only increases the respondent burden but threatens to impact seriously on the many voluntary surveys conducted by Census.

3. The Census Bureau for many years has had a major statistical responsibility in the collection and publication of economic data. The Census of Manufactures is the major benchmark publication used by a number of Government agencies in validating their statistical programs. The information regarding product shipments and materials consumed by industry are important elements in the periodic updating of the input-output tables developed by the Bureau of Economic Analysis. These tables are then used to revise the estimates of Gross National Product. The Census data are also used in establishing benchmark levels for the Federal Reserve Board's Index of Industrial Production and in determining value added and value of shipments weights to be used in the regular monthly publication of that index.

4. The Census of Manufactures data, particularly the shipments and value added data, are also used by



the Bureau of Labor Statistics (BLS) in setting their Wholesale Price Index weights and in the development of special-purpose industry indexes. BLS also uses the census data for productivity and other special studies. The Bureau of Mines uses much of the materials consumed data as benchmarks for their more frequent monthly and annual surveys.

5. In addition to these regular uses for statistical purposes, the detailed Census of Manufactures data are widely used by other Government agencies such as the Council of Economic Advisers, Bureau of Domestic Commerce of the Department of Commerce, the Federal Energy Administration, and the Treasury Department in analytic studies of specific industries, products, materials, or fuels consumed. The Federal Trade Commission and the Justice Department use the measures of concentration (share of each industry and product class accounted for by the 4, 8, 20 and 50 largest companies) in connection with their investigations under the antitrust laws.

6. In recent years added emphasis has been given to the shipments of commodity data due to the increase in import and export activity and the need to measure the impact of foreign trade on domestic industry. The Trade Act of 1974, Public Law 93-618, 88 Stat. 1978 (See 19 U.S.C. 2101), seeks statistical comparability of domestic production with data for imports and exports.

*Addendum C*

7. The Census Bureau also publishes a wide range of other data from the quinquennial economic censuses program and from the large number of monthly, quarterly, and annual surveys conducted by the Bureau. These are also used by many Government agencies in evaluating current business conditions and in forecasting future trends.

8. In recognition of the importance placed on the statistical program at Census and in order to provide for the maximum safeguard of the information reported to it, the Congress has provided for the confidentiality of information submitted to Census in section 9 of title 13, U.S.C. In 1961 the Supreme Court ruled in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961) that under the census statute at that time, file copies of reports submitted to the Bureau of the Census were not immune from legal process and therefore their production could be compelled by the Federal Trade Commission. As a result of this decision, some respondents, fearing subpoena, destroyed the file copies of reports submitted to Census. Census therefore experienced difficulty in asking companies to check on the accuracy of their reports as well as a reluctance on the part of some respondents to report to the Census Bureau at all. Until corrective legislation was passed in 1962 (only 10 months subsequent to Supreme Court decision in *St. Regis*), to amend title 13 to provide immunity from subpoena of file copies, a real threat existed to the entire economic sector statistical program at Census.



*Addendum C*

9. I see a similar situation existing today in that the Federal Trade Commission's Corporate Patterns Report Program may adversely affect the Census Bureau's ability to collect and publish selected data. Companies may be unwilling to provide data to the Census Bureau on an estimated basis or may refuse to submit such estimates when they anticipate that the same information will be requested by a regulatory agency or that the data will be made publicly available. Information, if furnished at all, may therefore be subject to additional validation by a company prior to submittal which would seriously affect the timeliness essential to the prompt reporting of aggregate data. In order to reduce respondent burden as well as assure timeliness in response, we indicate to respondents that in the absence of book figures carefully prepared estimates are acceptable. This approach is acceptable since we are interested in compiling statistical estimates rather than totals with accounting accuracy. The more complex, diversified companies maintain different types of records at different levels of management control. Since the Census Bureau basically seeks information at the operating level (establishment data), many companies have to go to divisional or other records in order to obtain information that can be used to estimate the establishment data. This is particularly the case when shipments occur between plants of the same company for further processing. The fact that much of the data supplied Census has been maintained or estimated

solely to meet the Census request is important. It seems to me that the keeping of the national statistical system must be maintained clear and free from any purpose other than for which it was developed. When the supplier of the data views that he is being coerced into supplying the same information to a nonstatistical agency, that may operate against his interest financially, the data he submits, in my judgment, are likely to be hedged or distorted so as to diminish their value statistically.

10. An additional adverse impact on our statistical programs may result from the perception that this is a burdensome duplication of reporting caused by the Corporate Patterns Report. Similar information for value of shipments by product class was collected as part of the 1972 Census of Manufactures and is collected annually by the Bureau of the Census in its Annual Survey of Manufactures program. It is felt that this results in an unnecessary respondent burden. We are now finalizing our plans for the 1977 Census of Manufactures. The extent to which the Corporate Patterns Survey erodes the cooperative spirit of trust between Census and industry could seriously threaten this program.

11. The census statute (13 U.S.C.) prohibits the Bureau of the Census from making any publication whereby the data furnished by any particular establishment or individual can be identified. Although the FTC has indicated that it will not publish the data in identifiable form before January 1978, I feel that the Corporate Patterns Survey will be viewed by



companies as a method to obtain access to identifiable information collected by Census.

12. The Bureau of the Census is also dependent on the voluntary cooperation of American industry in the conduct of numerous surveys that provide important economic indicators. These surveys include the monthly Manufacturers' Shipments, Inventories, and Orders Survey, the weekly and monthly Retail Sales Surveys, and the numerous monthly and quarterly Current Industrial Reports. As a result of FTC's regulatory programs and the resulting reporting burden, I anticipate a loss of cooperation to many of our important statistical programs in which information is reported on a voluntary basis. This is borne out by our recent experience when we called 12 very large manufacturing companies that had discontinued reporting in the monthly manufactures survey mentioned above. More than half of the companies cited the Government's expanded mandatory reporting program as the reason for discontinuing their reporting in the Census survey.

13. I am particularly concerned about the specific reference to Census surveys and report forms in recent correspondence by FTC with the business community relating to the Corporate Patterns Survey and the resulting impact this association may have on the work of the Census Bureau. I find no basis for modifying the position Census has consistently taken with respect to the Corporate Patterns Re-

port; namely, that Census does not desire to have its statistical reporting relationship with industry, which is confidential under law, referred to in any way in the CPR program by FTC. Both on the basis of law and on the written and verbal commitments made by the Bureau, industry has accepted the proposition that the Bureau of the Census will use the information industry provides for statistical purposes only and not for purposes of investigation, regulation, or taxation. I feel very strongly that these relationships should not be disturbed in any manner by the activities of the Federal Trade Commission.

14. Although the Bureau of the Census cannot furnish FTC individual company data, we could provide aggregate information from Census publications by means of special tabulations provided on a reimbursable basis. The kinds of special tabulations that could be developed for FTC are not limited to value of shipments and merger and acquisition data for the largest 1,200 companies every 5 years. The Bureau's many economic surveys provide an extensive current data base which has a high degree of reliability. For example, the Bureau's Annual Survey of Manufactures can provide concentration tabulations similar to those published at 5-year intervals as part of the Census of Manufactures. The Bureau's technical staff is frequently called on to develop analytical ratios of industrial activity and for calculation of regressions or cross-tabulations of selected data on a reimbursable basis. In fact,



**all that is necessary is for the FTC to specify its requirements for aggregate data, and a cost and time estimate will be provided.**

**Subject to the limitations mentioned above, Census would make every effort to maximize the amount of data to be made available.**

**/s/ VINCENT P. BARABBA**

**VINCENT P. BARABBA**

**Subscribed and sworn to before me this 13 day of July, 1976**

**/s/ IRENE C. STEWART**

**Notary Public**
**My commission expires 7-1-78**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-167**

AMERICAN AIR FILTER COMPANY, INC., *et al.*,
*Petitioners,*

*v.*

FEDERAL TRADE COMMISSION, *et al.*,
*Respondents.*

## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-167

AMERICAN AIR FILTER COMPANY, INC., *et al.*,
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*v.*

FEDERAL TRADE COMMISSION, *et al.*,
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## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

On August 2, 1978, subsequent to the filing of petitions for writs of certiorari, respondent, Federal Trade Commission ("FTC"), filed in the United States Court of Appeals for the District of Columbia Circuit a motion requesting that that court's mandate be issued forthwith.

On August 3, 1978, the Court of Appeals issued an order that called for the filing of memoranda by the parties directed to certain questions raised by the court.

On September 28, 1978, a panel of the Court of Appeals,* *per curiam,* filed a memorandum opinion and

* The panel consisted of Circuit Judges Bazelon and Spotswood Robinson and District Judge Aubrey Robinson.

issued an order: (1) denying the FTC's motion for issuance of the mandate; and (2) ordering, *sua sponte,* that the district court's orders that are the subject of the instant petitions be stayed pending action by this Court. The memorandum opinion and order are reprinted in Addendum A, *infra,* to supplement the appendix that was submitted with the petition.

The Court of Appeals' grant of a stay was based upon its review of the petitions filed in this Court and its "find[ing] that the issues they tender are substantial." Addendum A at A5, A8.

Respectfully submitted,

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# ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1978

Misc. No. 76-127

No. 77-1728

IN RE:

FTC Line of Business Report Litigation, *Appellants*
And Consolidated Case Nos. 77-1931, 77-1947, 77-1953, 77-1956, 77-1942 and 77-1944

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Misc. No. 76-0126

No. 77-1732

IN RE:

FTC Corporate Patterns Report Litigation, *Appellants*

And Consolidated Case Nos. 77-1930, 77-1943 and 77-1952

BEFORE: BAZELON and ROBINSON, Circuit Judges, and AUBREY E. ROBINSON, JR.*, District Judge, United States District Court for the District of Columbia.

**Order**

(Filed September 28, 1976)

Upon consideration of the motion of the Federal Trade Commission for issuance of the mandate herein, and of the memoranda in support of and in opposition to the motion, it is, for the reasons expressed in the accompanying memorandum,

ORDERED by the Court that the motion for issuance of the mandate be and hereby is denied; and it is

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Further ORDERED by the Court, *sua sponte*, that the District Court's orders reviewed herein be and hereby are stayed pending action by the Supreme Court of the United States upon the petitions for writs of certiorari directed to this Court's judgment of July 10, 1978.

*Per Curiam*
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
*Clerk*



No. 77-1728—In re FTC Line of Business Report Litigation

**Memorandum**

On July 10, 1978, we affirmed a judgment of the District Court which directed compliance with orders that the Federal Trade Commission seeks to have enforced in these companion cases.[1] Eighteen days later, the Clerk of this court was notified that three petitions had been filed in the Supreme Court directed to our action.[2] In cases wherein a petition for certiorari is presented within 21 days from the entry of judgment here,[3] it has long been the Clerk's policy to automatically withhold the mandate pending disposition of the petition.[4] That course he pursued in the instant litigation.

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[1] *In re FTC Line of Business Report Litigation*, No. 77-1728, *In re FTC Corporate Patterns Report Litigation*, No. 77-1732 (D.C. Cir. July 10, 1978).

[2] *American Air Filter Co.* v. *FTC*, No. 78-167 (July 28, 1978); *Goodyear Tire & Rubber Co.* v. *FTC*, No. 78-168 (July 28, 1978); *Deering Milliken, Inc.* v. *FTC*, No. 78-169 (July 28, 1978). See also 47 U.S.L.W. 3070 (1978).

[3] See Fed. R. App. P. 41(b), quoted *infra* note 5.

[4] See D.C. Cir. Handbook of Practice & Internal Procedures 70, 74-75 (1978), stating relevantly:

> [A] petition for certiorari to the United States Supreme Court, filed within the 21-day period, suspends issuance of the "mandate" until the case is disposed of in the Supreme Court.
>
> • • • • •
>
> A petition for certiorari filed before the mandate of this Court is issued stays the mandate until the Supreme Court disposes of the case. This Court upon motion may also stay its mandate prior to the filing of a petition for certiorari. . . . If a petition for certiorari is filed within the term of the stay, the stay continues until the case is disposed of by the Supreme Court. Upon denial of the petition for certiorari, this Court's mandate is to be issued immediately.

The Commission has moved for issuance of the mandate, contending that the Clerk's practice is contrary to Rule 41 of the Federal Rules of Appellate Procedure [5] and Rule 14(b) of the General Rules of this court.[6] Appellants, on the other hand, defend the practice, and indicate that they relied on it in deciding not to request that the mandate be stayed.

I

As a panel confronted with a procedural policy of general applicability, we normally would refer this problem to the full court for resolution. Since, however, a majority of our regular active judges have recused themselves from

[5] Fed. R. App. P. 41 states:

> (a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.
>
> (b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

[6] "A petition for a stay of the issuance of mandate shall not be granted simply upon request. A stay shall not issue unless the petition sets forth facts showing good cause for the relief sought." D.C. Cir. Gen. Rule 14(b) (1978).



participation in these cases,[7] it is obviously inappropriate to solicit their guidance at this time on a question impacting the litigation so directly.[8] Moreover, there is no need for anyone to undertake at this time a resolution of the procedural dilemma the parties have posed, for it is clear to us that were there a motion for stay of the mandate we would be obliged to grant it. We have examined the petitions for certiorari and find that the issues they tender are substantial; resultantly, we must conclude that there exists good cause to justify staying the mandate pending disposition of the petitions. We say this without any inclination toward issuance of such a stay *sua sponte*. Rather, our purpose is to point out that there is no occasion to consider the propriety of the Clerk's automatic retention of the mandate when it is evident in the circumstances here that a stay would be available merely for the asking.

We thus leave the Clerk's action undisturbed, but we hasten to make plain our view that the consequence is simply that the mandate will not issue immediately, and not that appellants could not be called upon to respond to the Commission's directives while the petitions for certiorari are pending. When we ordered replies to the Commission's motion, we instructed all parties to address

> the relationship between a stay of issuance of the mandate and the operation of the District Court's orders granting enforcement of the Federal Trade Commission's report orders; and [the] effect, if any, . . . a stay of the mandate [would] have on the enforcement of the Commission's orders[.]

To insure that no one will be misled by our disposition of the motion, we elucidate the course of our reasoning on that score.

[7] For the information of counsel we noted this fact in our judgment disposing of the appeals.

[8] With the problem adjudicated for the instant cases by today's action, we will ask the Judicial Council for this circuit to settle it for the future. See 28 U.S.C. § 332(d) (1976).

II

The starting point is a resume of the events operative in this connection. The District Court entered final judgment directing obedience to the Commission's Line of Business Report orders within 150 days and with the Corporate Patterns Report orders within 90 days, subject to any extensions by the Commission.[9] The District Court denied motions for stays of these orders pending appeals to this court and we, in turn, did likewise. An application for a stay was thereafter made to the Supreme Court, but only in the *Corporate Patterns Report* case. A temporary stay was granted by Chief Justice Burger, and somewhat later Justice Brennan extended the stay pending "final disposition" of the appeal in that case by this court.

During oral argument before us, appellants urged reconsideration of their motion in this court for a stay of the District Court's enforcement order respecting the Line of Business Report program. After initial Commission extensions of the compliance deadline therefor, we issued a stay until further order to preserve the status quo while the litigation was under submission. When, subsequently, our opinion and judgment affirming the District Court were announced, we directed compliance with the District Court's orders within 30 days thereafter. Within the 30-day period, we granted another stay of those orders to enable consideration of the Commission's motion for issuance of the mandate.

III

Thus coming to the fore is the question whether the Clerk's withholding of the mandate of this court itself operates to stay compliance with the District Court's enforcement orders in these cases. Appellants have foregone any

[9] *In re FTC Line of Business Report Litigation, supra* note 1 (order of Aug. 3, 1978).



request for a further stay of these orders in the apparent belief that non-issuance of the mandate, standing alone, will have that effect. We do not share that view.

It is well established that the District Court is without jurisdiction to alter a judgment of its own while an appeal therefrom is ongoing.[10] But it is equally clear that the vitality of that judgment is undiminished by pendancy of the appeal. Unless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative.[11] To be sure, for as long as the appellate court retains its mandate it mantains

[10] *Smith* v. *Pollin*, 90 U.S.App.D.C. 178, 179, 194 F.2d 349, 350 (1952); *Bush* v. *United Benefit Fire Ins. Co.*, 311 F.2d 893, 894 (5th Cir. 1963); *Asher* v. *Harrington*, 461 F.2d 890, 895 (7th Cir. 1972); *In re Fed. Facilities Realty Trust*, 227 F.2d 651, 653-654 (7th Cir. 1955); *Janousek* v. *Doyle*, 313 F.2d 916, 920 (8th Cir. 1963); *Merritt-Chapman & Scott Corp.* v. *City of Seattle*, 281 F.2d 896, 898-899 (9th Cir. 1960); *Petusky* v. *Rampton*, 431 F.2d 378, 381 (10th Cir. 1970), *cert. denied*, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971); see generally 9 J. Moore, Federal Practice ¶ 203.11, at 734-736 (2d ed. 1948).

[11] *Hovey* v. *McDonald*, 109 U.S. 150, 161 (1883) ("an appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effects"); *Gullett* v. *Gullett*, 85 U.S.App. D.C. 12, 14, 174 F.2d 531, 533 (1949); *Weston Lighting Corp.* v. *Smoot-Holman Co.*, 352 F.2d 1019, 1020-1021 (9th Cir. 1965); *United States* v. *City of Chicago*, 411 F.Supp. 218, 246 (N.D. Ill. 1976), *modified*, 549 F.2d 415 (7th Cir. 1977). See also 9 J. Moore, Federal Practice ¶ 208.03, at 1407-1408 (2d ed. 1948):

> The only consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final, notwithstanding that an appeal is pending. If the judgment awards money or property, it may be executed upon unless stayed; if it awards an injunction, the injunction is effective unless stayed; if it refuses an injunction, the prevailing party may engage in the conduct that was sought to be restrained unless an injunction pending appeal is obtained. . . .

(footnotes omitted).

its jurisdiction over the case,[12] and thus the power to alter the mandate.[13] But non-issuance of the mandate by the appellate court has no impact on the trial court's powers to enforce its unstayed judgment since the latter court has retained that power throughout the pendancy of the appeal.[14]

We could, of course, vacate our current stay of the District Court's orders and thereby restore that court's ability to enforce it. We are constrained, however, under the present circumstances to continue the stay until such time as the Supreme Court disposes of the petitions for writs of certiorari. When, shortly after the cases arrived here, we denied appellants' motions for stays, it was our view that the impediment to the Commission's statutory obligations resulting from materially delayed implementation of these reporting programs outweighed any injury feared by appellants, but conditions have since changed significantly. The appellate process in this court has been completed; the questions presented to the Supreme Court, as we have said, are substantial; and the likelihood is that Supreme Court action on the petitions is relatively near at hand. In light of that Court's decision to issue a stay in *Corporate Patterns Report* for the duration of the appeal here, refusal

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[12] *Burget* v. *Robinson*, 123 F. 262, 264 (1st Cir.), *cert. denied*, 188 U.S. 739, 23 S.Ct. 848, 47 L.Ed. 677 (1903); *Alphin* v. *Henson*, 552 F.2d 1033, 1034 (4th Cir.), *cert. denied*, 434 U.S. 823, 89 S.Ct. 67, 54 L.Ed.2d 80 (1977); *Meredith* v. *Fair*, 306 F.2d 374, 376 (5th Cir.), *order enjoining interference with Court of Appeals mandate and vacating stay*, 83 S.Ct. 10, 9 L.Ed.2d 43 (Black, J., in chambers), *cert. denied*, 371 U.S. 828, 83 S.Ct. 49, 9 L.Ed.2d 66 (1962); *Omaha Elec. Light & Power Co.* v. *City of Omaha*, 216 F. 848, 855 (8th Cir. 1914).

[13] *Burget* v. *Robinson*, *supra* note 12, 123 F. at 264; *Omaha Elec. Light & Power Co.* v. *City of Omaha*, *supra* note 12, 216 F. at 856.

[14] See authorities cited *supra* note 11.



to further stay the orders in these cases for the ostensibly short period prior to Supreme Court disposition of the petition hardly seems indicated. In sum, we think the balance of the equities now favors a continued stay of the District Court's orders—so much so that we should act *sua sponte*.

Supreme Court, U. S.
FILED
JUL 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78- 78-167

AMERICAN AIR FILTER COMPANY, INC., et al.,
*Petitioners*

v.

FEDERAL TRADE COMMISSION, et al.,
*Respondents*

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No. 78- 78-168

THE GOODYEAR TIRE & RUBBER COMPANY, et al.,
*Petitioners*

v.

FEDERAL TRADE COMMISSION, et al.,
*Respondents*

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No. 78- 78-169

DEERING-MILLIKEN, INC.,
*Petitioner,*

v.

FEDERAL TRADE COMMISSION, et al.,
*Respondents*

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## PETITIONERS' JOINT APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 77-1728

IN RE: FTC LINE OF BUSINESS REPORT LITIGATION, APPELLANTS

(Misc. No. 76-127)

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No. 77-1931

IN RE: FTC LINE OF BUSINESS REPORT LITIGATION
AMERICAN CYANAMID COMPANY, *et al.*, APPELLANTS

(Misc. Civil Action No. 76-0127)

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No. 77-1942

DEERING MILLIKEN, INC., APPELLANT

v.

FEDERAL TRADE COMMISSION, *et al.*

(Civil Action No. 76-1095)

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No. 77-1944

DEERING-MILLIKEN, INC., APPELLANT

v.

FEDERAL TRADE COMMISSION, *et al.*

(Civil Action No. 76-1109)

No. 77-1947

IN RE: FTC LINE OF BUSINESS REPORT LITIGATION
NL INDUSTRIES, INC., APPELLANT

(Misc. No. 76-0127)

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No. 77-1953

IN RE: FTC LINE OF BUSINESS REPORT LITIGATION
FEDERAL TRADE COMMISSION PARTIES, APPELLANTS

(Misc. Civil Action No. 76-0127)

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No. 77-1956

IN RE: FTC LINE OF BUSINESS REPORT LITIGATION
CYCLOPS CORPORATION, APPELLANT

(Civil Action Misc. No. 76-0127)

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No. 77-1732

IN RE: FTC CORPORATE PATTERNS REPORT LITIGATION,
APPELLANTS

(Misc. No. 76-0126)

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No. 77-1930

IN RE: FTC CORPORATE PATTERNS REPORT LITIGATION
AMERICAN CYANAMID COMPANY, *et al.*, APPELLANTS

(Misc. Civil Action No. 76-0216)



No. 77-1943

DEERING-MILLIKEN, INC., APPELLANT

v.

FEDERAL TRADE COMMISSION, *et al.*

(Civil Action No. 76-1123)

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No. 77-1952

IN RE: FTC CORPORATE PATTERNS REPORT LITIGATION
FEDERAL TRADE COMMISSION PARTIES, APPELLANTS

(Misc. Civil Action No. 76-0126)

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Appeals from the United States District Court
for the District of Columbia

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Argued December 16, 1977

Decided July 10, 1978

*J. Randolph Wilson,* with whom *John S. Koch,* and *Steven S. Rosenthal* were on the brief, for appellants Air Products and Chemicals, Inc., *et al.,* in Nos. 77-1728 and 77-1732.

*Lee A. Rau,* with whom *Edward T. Tait, John M. Wood* and *Stuart M. Gerson* were on the brief, for appellants American Air Filter Co., Inc., *et al.,* in Nos. 77-1728 and 77-1732.

*Mark Jacoby* with whom *Ira M. Millstein* and *Salem M. Katsch* were on the brief, for appellants Aluminum Co. of America, *et al.,* in Nos. 77-1728 and 77-1732.

*John C. Reitz* was on the brief, for appellants American Greetings Corp., *et al.*, in Nos. 77-1728 and 77-1732.

*James R. Henderson* was on the brief, for appellants, Inland Steel Co., *et al.*, in Nos. 77-1728 and 77-1732.

*John F. Graybeal* and *Robert C. Houser, Jr.* were on the brief, for appellant Square D Co., in Nos. 77-1728 and 77-1732.

*Andrew S. Krulwich* was on the brief for appellant Hoffman LaRoche, in Nos. 77-1732, and for appellant Lone Star Industries, Inc., in No. 77-1728.

*Philip J. Davis* was on the brief, for appellant Chemetron Corp., in Nos. 77-1728 and 77-1732.

*James F. Rill* was on the brief, for appellant Carpenter Technology Corp., *et al.*, in No. 77-1732, and for appellant A. E. Staley Manufacturing Co. in No. 77-1728.

*James F. Bromley* was on the brief, for appellant United States Gypsum Co. in Nos. 77-1728 and 77-1732.

*Ronald P. Wertheim* was on the brief, for appellant Ashland Oil, Inc., in Nos. 77-1728 and 77-1732.

*Daniel K. Mayers* and *Neil J. King* were on the brief, for appellants The Babcock and Wilcox Co., *et al.*, in Nos. 77-1728 and 77-1732.

*William C. Collishaw* was on the brief, for appellant White Consolidated Industries, Inc., in Nos. 77-1728 and 77-1732.

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*Raymond E. Vickery, Jr.*, was on the brief, for appellants Hughes Tool Co., *et al.*, in No. 77-1732.

*Ramsay D. Potts* and *Steven L. Meltzer* were on the brief, for appellant Emerson Electric Co., in Nos. 77-1728 and 77-1732.



*Milton Wolson* and *S. White Rhyne, Jr.* was on the brief, for appellant SCM Corp., in Nos. 77-1728 and 77-1732.

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*David J. Lewis* and *Elroy H. Wolff* were on the brief, for appellants Thomas Lipton, Inc., *et al.*, in Nos. 77-1728 and 77-1732.

*Anthony B. Barton* was on the brief, for appellant, American Maize-Products Co., in Nos. 77-1728 and 77-1732.

*Eve E. Backrack* was on the brief, for appellant Food Fair Stores, Inc., in No. 77-1732, and for appellant C.I.T. Financial Corp., in No. 77-1728.

*Coswell O. Hobbs, III,* was on the brief, for American Stores Co., in No. 77-1732.

*Robert J. Pope* was on the brief, for appellant Continental Group Inc., in No. 77-1732.

*Philip A. Lacavara* and *Gerald Goldman* were on the brief, for appellants Merck and Co., Inc., *et al.*, in No. 77-1728.

*J. Stanley Stroud* was on the brief, for appellants CPC International, Inc., *et al.*, in No. 77-1728.

*David B. Lytle* was on the brief, for appellant Republic Steel Corp., in No. 77-1728.

*Joseph W. Burns* was on the brief, for appellant Ingersoll-Rand Co., in No. 77-1728.

*Ronald G. Precup* was on the brief, for appellant American Beef Packers, Inc., in No. 77-1728.

*Gilbert H. Weil* was on the brief, for Bristol-Myers Co., in No. 77-1728.

*William Simon, Harold F. Baker, David C. Murchison, J. Wallace Adair, John DeQ. Briggs, III,* and *Stuart H. Harris* were on the brief, for appellants American Cyanamid Co., *et al.*, in Nos. 77-1728, 77-1732, 77-1930 and 77-1931.

*Robert E. Jordan, III, Edward E. Vaill* and *Robert M. Goolrick* were on the brief, for appellant, Atlantic Richfield Co., in Nos. 77-1728 and 77-1732.

*Andrew J. Kilcarr* and *Vincent Tricarico* were on the brief, for appellant Mobil Oil Corp., in Nos. 77-1728 and 77-1732.

*Jesse P. Luton, Jr., John E. Bailey* and *Kevin F. Cunningham* were on the brief, for appellant Gulf Oil Corp., in Nos. 77-1728 and 77-1732.

*Paul J. Newlon, Victoria G. Traube* and *Michael A. Lampert* were on the brief, for appellant Milliken and Co., *et al.*, in Nos. 77-1728, 77-1732, 77-1942, 77-1943 and 77-1944.

*Leslie W. Jacobs* was on the brief, for appellant The Goodyear Tire and Rubber Co., *et al.*, in Nos. 77-1728 and 77-1732.

*Gerald P. Norton,* Deputy General Counsel, Federal Trade Commission with whom *Jerald D. Cummins,* Acting Assistant General Counsel, *Joanne L. Levine, Sophie A. Krasik, Thomas A. Sheehan* and *Arthur W. Adelberg,* Attorneys, Federal Trade Commission, were on the briefs, for appellees Federal Trade Commission, in Nos. 77-1728, 77-1732, 77-1930, 77-1931, 77-1942, 77-1943, 77-1944, 77-1947 and 77-1956, and cross-appellants in Nos. 77-1952 and 77-1953.

*Frank R. Rosenfeld,* Attorney, Department of Justice with whom *Earl J. Silbert,* United States Attorney, *Barbara Allen Babcock,* Assistant Attorney General, and *Leonard Schaitman,* Attorney, Department of Justice, were on the brief, for appellee Comptroller General, in No. 77-1728.



Before BAZELON and ROBINSON, *Circuit Judges,* and AUBREY E. ROBINSON, JR.,* *District Judge,* United States District Court for the District of Columbia.

Opinion *per curiam.*

PER CURIAM: We review the decisions of the District Court granting summary judgment to the Federal Trade Commission (Commission or FTC) and enforcing the Commission's orders requiring appellant corporations to file financial performance reports as part of the Line of Business (LB) and Corporate Patterns Report (CPR) surveys.[1]

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1970).

[1] Multiple enforcement actions were brought by the Commission against companies who failed to comply with the 1974 LB and 1972 CPR orders. The actions relating to the two surveys were assigned to Judge Flannery who consolidated them into two dockets, *In re FTC Line of Business Report Litigations,* Master File Misc. No. 76-127 and *In re Corporate Patterns Report Litigations,* Master File Misc. No. 76-126. By order dated July 30, 1976 Judge Flannery established procedures for his tandem consideration of the two programs. (LB App. 162-186) In a series of opinions and orders the District Court addressed the numerous issues raised by the parties. *In re FTC Corporate Patterns Report Litigations,* 432 F.Supp. 274 (Jan. 21, 1977) (LB App. 187); 432 F.Supp. 291 (April 12, 1977) (LB App. 211); 1977-2 Trade Cas. 72,141 (July 11, 1977) (LB App. 239); (unreported Final Order and Judgments) (July 15, 1977) (LB App. 271; CPR App. 248); 1977-2 Trade Cas. 72,420 (July 29, 1977) (denying motion to amend).

Pursuant to the final order and judgment of the District Court entered July 15, 1977, the corporate parties were required to file their Line of Business reports within 150 days of the date of the order and the Corporate Patterns Reports within 90 days. A motion for stay of the enforcement order pending appeal was denied by the District Court on July 22, 1977 (LB App. 273) and by this court on October 21, 1977 (LB App. 274). Petition was made to the Supreme Court for a stay pending appeal in this court of the Corporate Patterns Report orders. Justice Brennan granted the petition on November 11, 1977 (CPR App. 253). Following several extensions of the compliance date in the Line of Business program, we issued an order on April 26, 1978 staying enforcement of the LB orders pending our further consideration of the matter.

These two broad-based statistical surveys are conducted by the FTC pursuant to its authority under Section 6(b) of the Federal Trade Commission Act, which empowers the Commission to require corporations to file informational reports regarding the company's "organization, business, conduct, practices, management, and relation to other corporations."[2]

## I. The FTC Surveys

### A. *The Line of Business Program.*

In August 1975, as part of the Line of Business survey, the Commission ordered 450 of the nation's largest domestic manufacturing concerns to file reports disclosing certain indicia of financial performance for 1974.[3] The 1974 LB

[2] 15 U.S.C. § 46(b) (1976) states that the Commission shall have the power

> To require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

[3] A more limited Line of Business survey was conducted for 1973. The LB form served on 345 companies in the 1973 survey differed from the 1974 form. See Bureau of Economics Staff Memorandum, 1974 Form LB Revision (LB App. 782). Numerous motions to quash the 1973 orders were denied by the Commission. Preenforcement actions seeking to enjoin the 1973 survey were



form sent to each corporate respondent consists of four schedules.[4] Schedule I seeks information identifying the company and its subsidiaries. Schedule II elicits a description of the company's lines of business. Schedule III, the heart of the form, exacts specific financial and statistical data—including revenues, costs, profits and assets—for each of the company's lines of business. Schedule IV requires reconciliation with other parts of the form and with the company's published financial data. The key feature of the survey is its requirement that each company present its financial performance statistics in terms of a uniform set of market categories.[5]

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commenced in the District Courts of Delaware and the Southern District of New York. *Aluminum Co. of America* v. *FTC*, 390 F. Supp. 301 (S.D.N.Y. 1975) (LB App. 89); *A.O. Smith Corp.* v. *FTC*, 396 F.Supp. 1108, 1125 (D. Del. 1975) (LB App. 55), *rev'd*, 530 F.2d 515 (3d Cir. 1976) (LB App. 121); *A.O. Smith Corp.* v. *FTC*, 417 F.Supp. 1068 (D. Del. 1976) (LB App. 196), 403 F. Supp. 1000 (D. Del. 1975) (LB App. 100). The Commission commenced an enforcement action in New York, *FTC* v. *American Standard, Inc.*, Civ. No. M18-304 (S.D.N.Y. Feb. 11, 1975), but later decided to abandon enforcement of the 1973 orders when it instituted proceedings to enforce the 1974 LB and the 1972 CPR orders in the District Court for the District of Columbia. The preenforcement actions in New York and Delaware, to which claims regarding the 1974 LB and the 1972 CPR surveys had been added, were transferred to the District of Columbia. *A.O. Smith Corp.* v. *FTC*, 417 F.Supp. 1068, 1085-1091 (D. Del. 1976) (LB App. 153-159).

Orders requiring reports for the 1975-1976 Line of Business survey have been served on 481 companies but the FTC has not instituted enforcement proceedings (LB App. 957).

[4] FTC Form LB (LB App. 735). See Instructions, Form LB, General (LB App. 748).

[5] The FTC has developed, based on the Office of Management and Budget's Standard Industrial Classification system, 260 four-digit codes which define manufacturing market categories (LB App. 765).

The Commission proposes to aggregate the LB statistics within each market category in order to identify areas of the economy in which profits are relatively high or low and to assess relationships between market structure and performance, and to use this information to target particular markets for industry-wide investigations into potential antitrust violations or unfair trade practices.[6] Since corporate financial performance data otherwise available to the Commission are not reported in terms of uniform market categories, the LB survey is expected to provide the only performance statistics susceptible to comparison on an industry-by-industry basis.[7] Aside from internal use of the LB data, the Commission has indicated an interest in publishing the aggregate market statistics to facilitate efforts for investors, managers and scholars to further the effectiveness of the competitive system.[8]

The Commission began developing the Line of Business form in 1970. After extended consideration and extensive revisions, a limited survey was conducted to collect 1973 data.[9] Revisions were made as a result of the Commission's experience with the 1973 survey, and in April 1975 the Commission published the proposed 1974 LB form in the

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[6] Federal Trade Commission, Annual Line of Business Report Program, Statement of Purpose (LB App. 308) (hereinafter cited as LB Statement of Purpose); Supporting Statement, FTC Form LB, 1974 Survey Version, Federal Trade Commission (July 1, 1975) (LB App. 715) (hereinafter cited as LB Supporting Statement).

[7] LB Supporting Statement, *supra* note 6, at 4 (LB App. 719).

[8] *Supra* note 6.

[9] The 1973 LB form was the subject of public hearings by the Office of Management and Budget (see Minutes, LB App. 2601), and notice and comment review by the Comptroller General (see Report to the Comptroller General of the United States on the Evaluation of the Federal Trade Commission's Proposed Annual Line of Business Report, May 10, 1974, at 3, LB App. 403).



Federal Register and solicited comments.[10] In addition, the FTC distributed copies of the proposed form and the Commission's supporting statement to numerous interested parties, inviting their responses.[11] On May 20, 1975, the full Commission conducted a hearing at which testimony was elicited from twenty witnesses regarding the proposed LB program.[12] After considering the nearly 100 comments received and the testimony presented, the FTC revised the LB form and submitted it to the General Accounting Office (GAO) for clearance under the Federal Reports Act.[13] Notice was published again in the Federal Register and comments were solicited by the GAO.[14] Upon consideration of the comments received, the GAO approved the LB form for use by the FTC in a letter detailing its deliberations.[15] The Line of Business orders were subsequently served on approximately 450 corporations.[16] Motions to quash the LB orders were made by 180 companies[17] and

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[10] 40 Fed. Reg. 17081 (April 16, 1975).

[11] Letter from William F. Long, Manager, Line of Business Program (April 15, 1975) (LB App. 2297); LB Supporting Statement, *supra* note 6, at 9-10 (LB App. 723-724).

[12] Transcript of Public Hearing on Proposed FTC Form LB for Use in Collecting 1974 Line of Business (May 20, 1975) (LB App. 1435).

[13] Letter from Virginia M. Harding, Acting Secretary of the FTC, to Elmer B. Staats, Comptroller General of the United States (July 1, 1975) (LB App. 2025).

[14] 40 Fed. Reg. 28677 (July 8, 1975).

[15] Letter from Monte Canfield, Jr., Director, General Accounting Office, to FTC Chairman Lewis A. Engman (August 18, 1975) (LB App. 798).

[16] Order to File Special Report, 1974 Form LB (August 20, 1975) (LB App. 804).

[17] *E.g.*, Joint Motion to Quash Orders to File Special Reports and for Other Appropriate Relief filed September 2, 1975, on behalf of A. O. Smith Corp., *et al.* (LB App. 853; Motion of C.I.T. Financial Corporation to Quash Order to File Special Report and

denied by the Commission in a statement responding to the objections advanced by the corporations.[18]

B. *The Corporate Patterns Report Program.*

The Corporate Patterns Report survey requires over 1100 major domestic corporations to report the value of shipments from their domestic manufacturing establishments in 1972, in terms of product classifications developed by the Census Bureau for use in the Quinquennial Census of Manufactures.[19] The CPR survey also solicits 1972 data regarding, *inter alia*, consolidated net manufacturing activities and major acquisitions and disposals since 1972.[20] As with the LB program, the FTC proposes to use the CPR survey to create a data bank on market structures for use by the Commission in antitrust enforcement, economic analysis and policy planning.[21] The value of shipments data will be used in conjunction with aggregate data published by the Census Bureau based on similar information contained in the 1972 Census of Manufactures.[22]

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Memorandum in support thereof, filed September 22, 1975 (LB App. 2421). For a list of companies which filed motions to quash, see Appendix I to FTC Petition for Enforcement, "Motions to Quash LB Orders Filed with the Federal Trade Commission by Respondents" (LB App. 2547).

[18] Statement of the Commission on Motions to Quash the Orders to File the 1974 Line of Business Form (LB App. 878).

[19] Corporate Patterns Report for 1972, FTC Form CPR-1 (CPR App. 305), FTC Form CPR-2 (CPR App. 318), FTC Form CPR-S (CPR App. 322); Supporting Statement for the Federal Trade Commission's Corporate Patterns Report (Dec. 31, 1974) (CPR App. 256) (hereinafter cited as CPR Supporting Statement).

[20] *Supra* note 19.

[21] CPR Supporting Statement, *supra* note 19, at 2 (CPR App. 257).

[22] *Id.* at 4 (CPR App. 259).



The Corporate Patterns Report survey was considered initially by the Commission in 1972.[23] After testing the proposed form on a small number of companies and effecting some modifications,[24] the FTC submitted the CPR form to the General Accounting Office for clearance as required under the Federal Reports Act. The GAO published notice of the proposed survey in the Federal Register and solicited comments.[25] The comments received were duly considered, and the GAO approved the CPR form in a letter to the FTC detailing the substance of these comments.[26] In addition to entertaining the comments supplied by the GAO, the FTC conferred with representatives from the Census Bureau and the Office of Management and Budget in a public meeting in June 1975[27] and less formally on other occasions. In July 1975 the Commission adopted a resolution authorizing the use of compulsory process,[28] and the Corporate Patterns Report orders were served on 1100 companies.[29] In response, motions to quash were filed by 390 companies raising numerous factual and legal objections.[30] In an effort to accommodate corporate claims, the Commission deleted an unduly burdensome requirement that each company rank itself as to each product category and re-

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[23] See FTC CPR Brief at 9.

[24] Supplemental Statement for the Federal Trade Commission's Corporate Patterns Report (December 23, 1974) at 12-13 (CPR App. 267-268).

[25] 40 Fed. Reg. 4689 (Dec. 31, 1975).

[26] Letter from Monte Canfield, Jr., Director of GAO, to FTC Chairman Engman (March 24, 1975) (CPR App. 778).

[27] Meeting Notes (June 12, 1975) (CPR App. 984).

[28] FTC Resolution Authorizing and Directing the Collection of Economic Reports (July 29, 1975) (CPR App. 299).

[29] See FTC Order to File Special Report addressed to Allen-Bradley Co. (July 29, 1975) (CPR App. 304).

[30] FTC CPR Brief at 11.

sponded to each of the corporations' objections in a letter denying the motions to quash.[31]

## II. Discussion

Enforcement actions were commenced in the District Court against the companies that had refused to comply with the Commission's orders.[32] Dissatisfied in several respects with the disposition rendered by the trial court, the corporations perfected this appeal. Appellants contend first that the orders in both the LB and CPR surveys were issued in violation of the rulemaking requirements of the Administrative Procedure Act (APA).[33] Second, appellants urge that the CPR survey is invalid because it violates the confidentiality provisions of the Census Act.[34] Third, appellants assert both substantive and procedural errors by the District Court in the enforcement proceeding.[35] Finally, appellants submit that the LB orders are infirm because of the alleged failure of the Comptroller General to review the LB forms in accordance with the requirements of the Federal Reports Act.[36] We address each of these contentions in turn.

### A. *Lawfulness of the FTC Report Orders.*

#### 1. Nonapplicability of the Administrative Procedure Act's Rulemaking Requirements.

The Federal Trade Commission Act (FTC Act)[37] provides a clear basis for authority for the Commission to issue orders requiring corporations to submit informational reports to the FTC. Section 6(b) of the Act states that the Commission shall have the power

> To require by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce or any class of them or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing.[38]

Appellants claim that the Commission's exercise of this authority, which they do not challenge,[39] in the development and implementation of the Line of Business and Corporate Patterns Report surveys was procedurally improper because the Commission failed to comply with the rulemaking requirements of the Administrative Procedure Act.[40]

Our first inquiry is whether the Federal Trade Commission Act obligates the Commission to observe APA rulemaking procedures when exercising its authority to require

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[31] Statement of the Commission, Motions to Quash, Corporate Patterns Special Report (CPR App. 455).

[32] See note 1, *supra*.

[33] See discussion in text *infra* at notes 37-55.

[34] See discussion in text *infra* at notes 56-86.

[35] See discussion in text *infra* at notes 89-143.

[36] See discussion in text *infra* at notes 144-159.

[37] 15 U.S.C. §§ 41 *et seq.* (1976).

[38] *Id.* § 46(b).

[39] During oral argument, counsel for appellants stated that the corporations were not "faulting with the power" of the Commission to conduct the Line of Business and Corporate Patterns Report surveys, but rather challenging only the alleged "procedural unfairness" of the way in which the Commission has exercised its authority.

[40] 5 U.S.C. § 553 (1976).

informational reporting pursuant to Section 6(b) of the FTC Act. We conclude that neither Section 6(b) nor any other section of the FTC Act requires adherence to the APA's rulemaking procedures nor does any section of the Act prescribe other procedural prerequisites to the exercise of the Commission's authority to require reporting. Section 6(b) states that the Commission by order may require corporations "to file with the Commission in such form as the Commission may prescribe . . . reports or answers in writing to specific questions, furnishing the Commission such information as it may require. . . ."[41] This section assuredly imposes no procedural qualification on the exercise of the Commission's authority to gather information. Section 6(g) of the FTC Act empowers the Commission to make rules and regulations for the purpose of carrying out the first eighteen sections of the Act.[42] But this section does not *require* that the FTC engage in rulemaking to implement 6(b) or any other section.[43] Rather, 6(g) simply authorizes the Commission to promulgate rules and regulations if it so desires. This is confirmed by the fact that the first eighteen sections include the subpoena authority of the FTC,[44] the exercise of which is not subject to rulemaking requirements.[45] Hence, Section 6(g) in no wise impugns the Commission's prerogative to order re-

[41] *Supra* note 38.

[42] 15 U.S.C. § 46(g) (1976) provides that the Commission shall have power "to make rules and regulations for the purpose of carrying out the provisions of section 41 to 46 and 47 to 58 of this title."

[43] See *National Petroleum Refiners Ass'n* v. *FTC*, 157 U.S. App. D.C. 83, 88, 482 F.2d 672, 677 (1973), *cert. denied*, 415 U.S. 951, 94 S. Ct. 1475, 39 L. Ed. 2d 567 (1974).

[44] 15 U.S.C. § 49(a) (1976).

[45] See, *e.g.*, *FTC* v. *Lonning*, 176 U.S.App.D.C. 200, 539 F.2d 202 (1976).



porting pursuant to Section 6(b) without preliminarily pursuing rulemaking procedures.[46]

Similarly, the Administrative Procedure Act[47] does not independently require rulemaking prior to the issuance of FTC informational report orders. The language and legislative history of the APA suggest a classification of agency activity into three basic categories: rulemaking, adjudication and investigation. The issuance of agency orders to

[46] Appellants rely heavily on the fact that the Securities and Exchange Commission and the Federal Power Commission have engaged in rulemaking in the development of information-gathering programs as support for the claim that the Federal Trade Commission should be required to conduct rulemaking proceedings prior to implementation of the LB and CPR programs. In our view, appellants' reliance is misplaced. The statute enabling the SEC to establish reporting requirements is substantially different from the Federal Trade Commission's governing legislation. The statutory provisions empowering the SEC to impose reporting requirements on corporations expressly provide that the SEC may do so only by the promulgation of rules and regulations in accordance with the Administrative Procedure Act. See, *e.g.*, 15 U.S.C. §§ 77s(a), 78m (a) (1976).

The Natural Gas Act authorizes the Federal Power Commission to require natural gas companies to file annual or special reports and, analogously to the FTC Act, does not expressly confine the FPC's information-gathering authority to the issuance of rules and regulations. Rather, 15 U.S.C. § 717i(a) (1976) provides, in part, that

> [e]very natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this chapter.

Nonetheless, in a recent exercise of its power to require reporting, the FPC *elected* to conduct rulemaking proceedings in accordance with the requirements of the APA. See *Union Oil Co.* v. *FPC*, 542 F.2d 1036, 1040 (9th Cir. 1976). Thus appellants derive no support from the examples of the SEC and FPC reporting programs.

[47] 5 U.S.C. §§ 551 *et seq.* (1976).

compel the filing of informational reports was plainly regarded an investigative act by the drafters of the APA, not a rule [48] or adjudication. Congressman Walter a principal sponsor of the APA, described investigate activity in

[48] We reject appellants' argument that the LB and CPR programs fall within the APA's definition of a "rule," 5 U.S.C. § 551(4) (1976), and are therefore subject to the APA's rulemaking requirements, *id.* §§ 551(5), 553. The APA defines a "rule" as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future or rates, wages, corporate or financial structures of reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

*Id.* § 551(4). Appellants make two arguments. First, appellants maintain that since the LB and CPR data will be used for regulatory purposes, the collection of the data itself is a prescription of law or policy within the meaning of the rule definition. We agree with the District Court that appellants' argument proves too much. 432 F. Supp. at 302. If the collection of information is considered a prescription of law or policy because of the possible regulatory uses to which the information may be put, then all types of compulsory process the product of which may be put to regulatory use—including subpoenas—would similarly require rulemaking.

Appellants' second argument, which applies only to the LB program, is that the LB reporting requirements constitute "approval or prescription for the future of . . . valuations, costs, or accounting, or practices bearing on any of the foregoing" within the terms of the APA's rule definition. But as the District Court determined, "the corporate parties can hardly claim that the present orders have prescribed accounting methods, since the present orders seek data from years past . . . ." 432 F. Supp. at 301. Since the LB instructions allow corporations to provide estimates or incomplete information when underlying data is unavailable, the corporations cannot reasonably assert that they are unable to satisfy the LB requirements under their current accounting and



the following terms during floor debate in the House of Representatives:

> The third type of administrative compulsory power may be incidental to either legislative or judicial powers of administrative agencies, or it may be en-

recordkeeping systems. Line of Business Form, Instructions, General at 2 (LB App. 749).

Appellants nevertheless contend that the LB program prescribes accounting practices for the future because the "natural and practical results" of the reporting requirements will be transformations of the corporations' accounting and recordkeeping practices. Since many corporations do not maintain financial records on the basis of the market classifications used in the LB program, corporations may decide to alter their future accounting practices to facilitate potentially recurring LB reporting obligations. But any adjustment undertaken by the corporations will be entirely voluntary and not at the express behest of the FTC. To the contrary, the Line of Business Form Instructions state expressly that "reporting corporations need not develop new accounting systems or substantially rework data processing procedures in order to complete the LB Form" *Id.* Moreover, the decision of any company subject to the LB orders to modify its accounting practices would most likely be based upon the company's prediction that it will be subject to substantially similar LB reporting requirements in future years and that an alteration in accounting methods would significantly ease the burden of compiling and certifying responses. See Evidentiary Hearing Before the District Court for the District of Columbia, June 16 and 17, 1977, Testimony of Howard Siers for Dupont Company, Transcript at 71 (LB App. 1080); Testimony of John Spellman for Grace Company, Transcript at 346, 361 (LB App. 1320, 1335). Yet the Commission has made no final decision to repeat the LB program in its present form on an annual basis, although it has the authority to do so. In fact, the Commission has indicated that it will reconsider the present market categories on the basis of the data it receives from the first fully-enforced survey and in light of the recently developed market classification guidelines of the Financial Accounting Standards Board. FTC Memorandum dated May 9, 1977, soliciting comments on revision of 1974 LB Form (LB App. 994). Accordingly, we conclude that neither the LB program nor the CPR survey is embraced by the APA's definition of a "rule."

> tirely independent of either. I refer to the compulsory action of administrative agencies when they issue subpoenas, require records or reports, or undertake mandatory inspections. These functions are investigative in nature.[49]

Investigative acts, specifically including report orders, are encompassed in Section 6(c) of the APA, which states "process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law."[50] Section 6(c), then, manifestly applies to the surveys in issue, which exact informational reports from selected corporations. Thus, that provisions's limitation that investigative orders "may not be issued, made, or enforced except as authorized by law" has direct bearing on this litigation. That phrase, however, simply refers to the statute authorizing the activity. In this case, the enabling statutory provision is Section 6(b) of the FTC Act, which, as we demonstrated above, does not impose rulemaking upon the FTC.[51] Accordingly, the Commission is not obligated under the Administrative Procedure Act to pursue rulemaking proceedings prior to implementation of the LB and CPR programs.

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[49] 92 Cong. Rec. 5648 (1948).

[50] 5 U.S.C. § 555(c) (1976).

[51] Our view comports with the Commission's interpretation of the procedural requirements of the Federal Trade Commission Act and the Administrative Procedure Act. The Commission has stated:

> It has been the Commission's long-standing interpretation of the interrelationship of the APA and the FTC Act that the Commission is not required to follow the APA procedures for rulemaking when the Commission decides to use its powers under Section 6, 15 U.S.C. § 46, or other provisions of the FTC Act, to gather information or to investigate.

Statement of the Commission on Motions to Quash the Orders to File the Line of Business Form at 11 (December 19, 1975) (LB App. 888). Deference is due an agency's interpretation of its own mandate and, to a lesser extent, to its interpretation of the Administrative Procedure Act. *International Telephone & Telegraph Corp.* v. *Local 134, International Brotherhood of Electrical Workers*, 419 U.S. 428, 441, 95 S.Ct. 600, 609, 42 L.Ed.2d 558, 569 (1975).



Our determination that these statistical surveys are investigative in character and therefore not subject to rulemaking procedures is buttressed by an earlier decision of this court in *Montship Lines, Ltd.* v. *Federal Maritime Board*,[52] which held that notice and hearing was not a prerequisite to the issuance of an industry-wide order by the Federal Maritime Board requiring the filing of statistical reports. In the same vein, the Fifth Circuit, in *United States* v. *W. H. Hodges & Co.*,[53] rejected the argument that the Secretary of Agriculture was subject to rulemaking requirements in directing stockyard marketing agencies to file special reports pursuant to a statutory authority that incorporates Section 6(b) of the FTC Act. The Court stated:

> The order at issue here was clearly investigatory in nature, as opposed to an adjudicatory or rulemaking process, and hence not subject to the procedures governing rule-making outlined in the APA. *Cf. Genuine Parts Co.* v. *F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971); K. Davis, *Administrative Law Treatise*, § 3.01 at 159, n.1 (1958).[54]

The LB and CPR surveys, too, are "clearly investigatory in nature" and just as plainly exempt from the Administrative Procedure Act's compulsory rulemaking requirements.[55]

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[52] 111 U.S.App.D.C. 160, 295 F.2d 147 (1961).

[53] 533 F.2d 276 (5th Cir. 1976).

[54] *Id.* at 278.

[55] Appellant corporations contend, nonetheless, that the Commission developed the Line of Business and Corporate Patterns Report programs "behind closed doors" and in contravention of sound

### 2. Confidentiality Provisions of the Census Act.

We next consider whether the Corporate Patterns Report program impermissibly affronts the Census Act.[56] Specifically, appellants contend that the CPR survey violates the confidentiality provision of the Census Act, which safeguards company-retained copies of census reports from compelled disclosure to any government agency.[57] Appellants insist that this provision protects not only the actual file copy of the census report, but also the company's statistical data that has been prepared in an assertedly "unique fashion" for the purpose of reporting to the Census Bureau.[58] The corporations argue that the Census Act's protection of retained census report copies insulates companies from any future requirement to respond to questions similar to those which the company has already answered in reports to the Census Bureau. Since the CPR

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public policy. Appellants' characterization of the FTC's procedure finds no support in the record. The Commission provided substantial opportunity for public input and made a conscientious effort to be responsive to the numerous comments, complaints and criticisms proffered by corporations, experts and other branches of the government. Although the corporations have not always approved of the Commission's resolution of their objections to the Line of Business and Corporate Patterns Report surveys, appellants' claim that they have been denied an opportunity to present their views to the Commission is, in our view, untenable. In any event, the Commission exercised its discretion to permit greater procedural access to the decision-making process involved in developing the LB and CPR programs than was required. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 46 U.S. L.W. 4301, 4307 (Sup. Ct. April 3, 1977).

[56] 13 U.S.C. §§ 1 *et seq.* (1976).

[57] *Id.* § 9(a)(3).

[58] Appellants seek to extend the Census Act's protection to "statistical information specially prepared for and submitted to the Census Bureau" that is "not prepared or maintained in the ordinary course of business." Joint Appellants' CPR brief at 15-16.



survey includes a question essentially identical to an item on the Census Bureau's 1972 Annual Survey of Manufactures,[59] appellants contend that the FTC is demanding information which the Census Act protects from compelled disclosure.

Both the CPR survey and the 1972 Survey of Manufactures require the respondent corporation to report the value of shipments[60] from its domestic manufacturing establishments during 1972 in terms of product categories developed by the Census Bureau.[61] The Commission plans to assess "the position of firms and of competitive conditions in various product markets" by comparing the CPR individual company value-of-shipments aggregates from

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[59] See note 63 *infra*.

[60] "Value of shipments" is defined by the Census Bureau and the FTC as "the value of products shipped for sale or transfer to other plants of the company which were manufactured, fabricated, processed or assembled" by the company. Census Instructions for completing the Annual Survey of Manufactures Report, 1973 at 7 (CPR App. 386); FTC Reference List for use in completing the Federal Trade Commission Corporate Patterns Report at 7-8 (CPR App. 333-334).

[61] *Compare* Item 9 of Census Form MA-100 (1973) (CPR App. 381), *with* Item 5 of *FTC* Form CPR-1, Corporate Patterns Report for 1972 (CPR App. 305).

The product-class codes utilized in the CPR survey are the five-digit codes developed by the Census Bureau in 1972 based on the Standard Industrial Classification system. Census of Manufactures: 1972 Numerical List of Manufactured Products (New (1977) SIC Basis). Series MC 72-1-12. The Annual Census of Manufactures for 1972 required reporting on the basis of product-class codes developed by the Census Bureau in 1967. Prior to publication of the 1972 data, however, the Census Bureau converted the survey results into the 1972 code classifications. The Census form for the Annual Survey of Manufactures for 1973 was sent to companies with each company's value of shipments for 1972 converted into the 1972 code classifications.

the Survey of Manufactures.[62] To maximize the comparative value of the CPR information, the FTC has concededly utilized definitions and product-class codes similar to those employed by Census.[63]

The confidentiality provision of the Census Act upon which appellants rely, Section 9(a)(3), is explicit in identifying the subject of its protection as "copies of census reports which have been retained."[64] It states that

> [n]o department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.[65]

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[62] FTC Resolution Authorizing and Directing the Collection of Economic Reports (Dec. 17, 1974) (CPR App. 254). See Comments prepared by Commission's Bureau of Economics staff on questions raised by staff of the General Accounting Office and discussed at meeting of March 11, 1975 (March 19, 1975) at 2 (CPR App. 283).

[63] FTC CPR Brief at 29. The inquiries are not identical in several respects. The CPR survey requires reporting in terms of the Census Bureau's revised 1972 product codes, whereas reporting for the Annual Survey of Manufactures for 1972 was done in terms of the 1968 codes. See note 61 *supra*. Second, the CPR survey requires total company value-of shipments data, whereas the Census Bureau required reporting by individual establishment (plant). Finally, the CPR form requires a certification of accuracy and permits the use of estimates only where the underlying data is unavailable. (CPR App. 305). The census form permits the use of approximations and estimates which are "substantially accurate." (CPR App. 692).

[64] 13 U.S.C. § 9(a)(3) (1976).

[65] *Id.*



This language unambiguously protects actual file copies of census reports retained by corporations. In fact, appellants' construction extends so far beyond the statute's plain terms that we might fairly reject it without further inquiry. In any event, an examination of the legislative history and purpose of the confidentiality provision of the Census Act equally belies appellants' assertion that the FTC's value-of-shipments inquiry is a circumvention of the Census Act's intended protection.[66]

Section 9(a)(3) was added to the Census Act in 1962[67] in response to the Supreme Court's holding in *St. Regis Paper Co.* v. *United States*[68] that a company's retained copy of its census form was not immune from compulsory disclosure to the Federal Trade Commission under the then-existing confidentiality provision of the Census Act. Prior to *St. Regis*, the Act's immunity, which expressly

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[66] "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used." (citations omitted) *United States* v. *Missouri Pac. RR. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322, 376 (1929). See also *Cass* v. *United States*, 417 U.S. 72, 76-79, 94 S.Ct. 2167, 2169-2171, 40 L.Ed.2d 668, 672-674 (1974); *United States* v. *Oregon*, 366 U.S. 643, 648, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575, 579 (1961); *Caminetti* v. *United States*, 242 U.S. 470, 484, 37 S.Ct. 192, 194, 61 L.Ed. 442, 452 (1917); *March* v. *United States*, 165 U.S.App.D.C. 267, 274-275, 506 F.2d 1306, 1313-1314 (1974); see generally 2A C.D. SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, (4th ed. 1973) ch. 46, p. 48-68; Murphy, *Old Maxims Never Die: the "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Col. L. Rev. 1299 (1975).

[67] Pub. L. No. 87-813, 76 Stat. 922 (1962).

[68] 368 U.S. 208, 82 St.Ct. 289, 7 L.Ed.2d 240 (1961).

applied only to census reports in the hands of the Census Bureau,[69] had been construed by some lower federal courts to apply with equal force to the company's retained copy.[70] The Census Bureau had encouraged companies to preserve copies of their census reports in order to facilitate consistency in their reporting from year to year, and had ex-

[69] Prior to the 1962 amendment, the confidentiality provision of the Census Act stated:

> (a) Neither the Secretary, nor any other officer or empolyee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
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> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied, or
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> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
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> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports. 68 Stat. 1013 (1954).

[70] The decisions interpreting the scope of the Census Act's confidentiality protection prior to 1962 consistently held that the *actual forms* submitted to the Census Bureau were protected from disclosure. *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958) (Census prohibited from releasing to antitrust defendant reports filed by competitors); *Federal Trade Commission* v. *Orton*, 175 F.Supp. 77 (S.D.N.Y. 1959) (FTC barred from subpoenaing schedules filed with Census Bureau).

The scope of the confidentiality provisions of the unamended Census Act in protecting the *copies* of the census form retained in the corporate files was the subject of disagreement among the federal courts. The Seventh Circuit in *FTC* v. *Dilger*, 276 F.2d 739 (7th Cir.), *cert. denied*, 364 U.S. 882, 81 S.Ct. 171, 5 L.Ed.2d 104 (1960), held that the retained copies did come within the purview of the Act. The Second Circuit, however, held that the company was not required to retain a copy of their filed report and that the retained file copies were therefore not secure from compelled disclosure. *St. Regis Paper Co.* v. *United States*, 285 F.2d 607 (2d Cir. 1960), *aff'd*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).



pressly assured corporations that their reports would not be used "for purposes of taxation, investigation or regulation."[71] The Supreme Court in *St. Regis* held that the Census Bureau's promises could not be enforced without rewriting the Act to protect the company's retained copy of their report—a task for Congress and not the Court.[72]

In the wake of the *St. Regis* decision, and at the request of the Commerce Department,[73] Congress moved promptly to enact legislation "clarifying the intent of the Census Act."[74] In so doing, the legislative history reveals, Congress sought to accommodate both the interest of the Census Bureau in protecting the file copies of respondents' reports and the interest of the federal regulatory agencies in collecting information needed for regulatory purposes.[75] The House committee considering the amendment specifically rejected language that would have made census "information, reports and other data" immune from legal process, thus clearly undermining appellants' assertion that Congress conferred such broad protection.[76] In its stead, Congress enacted a provision protecting only "copies of

[71] *St. Regis Paper Co.* v. *United States*, *supra* note 70, 368 U.S. at 216, 82 S.Ct. at 294, 7 L.Ed.2d at 247.

[72] *Id.* at 218, 82 S.Ct. at 295, 7 L.Ed.2d at 248.

[73] S. Rep. No. 2218, 87th Cong., 2d Sess. (1962) (hereinafter cited as Senate Report) (CPR App. 657).

[74] H.R. Rep. No. 2437, 87th Cong., 2d Sess. 2 (1962) (hereinafter cited as House Report) (CPR App. 645); Senate Report, *supra* note 73, at 2 (CPR App. 658).

[75] Moreover, the express provision of the Census Act requires accommodation of the interest of the federal agencies in gathering information. 13 U.S.C. § 132 (1976), states that "nothing in this title shall be deemed to revoke or impair the authority of any other Federal Agency with respect to the collection or release of information."

[76] House Report, *supra* note 74, at 1 (CPR App. 644).

census reports which have been retained."[77] In determining not to immunize a company's census "data" and "information" from disclosure, the committee accepted the recommendation of the administration presented in a letter from the Bureau of the Budget included in the House report:

> [C]are must be taken not to extend confidentiality to such an extent as to interfere unduly with responsibilities of other agencies of Government in carrying out functions which require information. These include the antitrust acts and other regulatory acts. . . . [T]he protection to the respondent's file copy of the census reports should apply only to the file copy and not to the information itself or to other records and documents of the company . . . . [A]ny extension of confidentiality beyond the census copy would be strongly opposed by the administration. . . .[78]

In addition, both the House and Senate reports include a letter from the Commerce Department favoring the restriction of the amendment's immunity to actual file copies and interpreting the impact that the limited protection would have on the ability of regulatory agencies to collect information. It stated:

> [T]he ability of a regulatory agency to formulate inquiries, even one identical with those asked by Census, would not be affected. The only restriction would be that the inquiry would not demand an answer by definition identical with that furnished the Census Bureau in another context and for another purpose.[79]

[77] *Id.*

[78] House Report, *supra* note 74, at 5 (CPR App. 648). See Hearings on Confidentiality of Census Reports Before the House Comm. on Post Office and Civil Service, 87th Cong., 2d Sess. (1962) (hereinafter cited as Census Hearings) at 27.



This distinction between a regulatory agency asking a *question* identical to that posed by the Census Bureau, which the FTC concedes it is doing,[80] and requiring an identical *answer*, which the FTC is not doing, is important, for it goes to the very purpose of affording immunity to census reports and their copies.

The legislative history of the 1962 amendment indicates two reasons why confidentiality was considered essential to candid and expeditious census reporting. First, in order to encourage prompt replies to Census questionnaires, companies are implored by the Bureau to "authorize subordinate officials to furnish information directly, without time-consuming formal clearance by comptrollers, auditors, or legal counsel concerned with problems other than statistical reporting."[81] Second, due to the differences in corporate accounting practices and the unavailability of final data at the time census reports are made, respondents are encouraged to use estimates and approximations.[82] Since a company's unreviewed, estimated or preliminary answers to the Census Bureau might not be suitable for submission to regulatory agencies for uses potentially detrimental to the corporation, the Census Bureau must be able to assure re-

[79] House Report, *supra* note 74, at 7 (CPR App. 650); Senate Report, *supra* note 73, at 4 (CPR App. 660). See also Statement of Walter Ryan, Acting Chief, Office of Statistical Standards, Bureau of the Budget, Census Hearings, *supra* note 78, at 15.

[80] See note 72, *supra*.

[81] Letter from Luther H. Hodges, Secretary of Commerce, to Tom Murray, Chairman, Comm. on Post Office and Civil Service, House of Representatives (July 19, 1962); House Report, *supra* note 74, at 6 (CPR App. 649) Senate Report, *supra* note 73, at 3 (CPR App. 659).

[82] *Id.*

spondents that they will not be required to provide another agency with answers necessarily identical to those given to the Census Bureau.[83]

The CPR survey, by presenting a question essentially identical to the Census inquiry with respect to value of shipments, does not "demand an answer by definition identical with that furnished the Census Bureau."[84] Simply put, the corporation is under no compulsion to supply the FTC with the same answer reported to Census, although it is certainly at liberty to do so.[85] While some corporations may use their census figures directly in responding to the CPR questionnaire, other corporations, by their own affidavits, have indicated that the unreviewed answers to the census inquiry are not sufficiently reliable for the certification of truthfulness required of their answers to the Federal Trade Commission.[86] These latter appellants would not be inhibited in any respect from amending their census responses so as to effect full and well-considered compli-

[83] See Ryan Statement, Census Hearings, *supra* note 78, at 17; Chamber of Commerce Statement, Census Hearings at 3; Federated Department Stores Statement, Census Hearings at 51; National Ass'n of Manufacturers Statement, Census Hearings at 62. See generally Note, *The Required Report Privileges*, 56 NW.U.L.REV. 283, 293 (1961).

[84] *Supra* note 79.

[85] See Statement of the Commission, Motions to Quash, Corporate Patterns Special Report at 13 (CPR App. 467); Letter from C.A. Tobin, Secretary to the FTC, "To Whom This May Concern" (Feb. 13, 1976) (CPR App. 335); Hearings on Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations For Fiscal Year 1977 Before the Senate Subcomm. on Appropriations, 94th Cong., 2d Sess. (1976) at 142-143 (CPR App. 617-18).

[86] Affidavit of Cargill, Inc. at 4-7 (CPR App. 723-726); Affidavit of Northwest Industries, Inc. at 3 (CPR App. 740); Affidavit of Goodyear Tire & Rubber Co. at 2-3 (CPR App. 733-734).



ance with the demands of the CPR program. It follows, then, that by merely including in the Corporate Patterns Report form a question similar to the inquiry made by the Census Bureau in the Survey of Manufactures, the Commission has not occasioned a breach of the Census Act's rigorous but carefully delineated assurance of confidentiality.

B. *Judicial Enforcement of FTC Informational Report Orders.*

1. The Applicable Standards of Review.

Section 9 of the Federal Trade Commission Act[87] vests jurisdiction in the district courts to command compliance, by mandamus, with FTC informational report orders issued pursuant to Section 6(b) of the FTC Act.[88] Prior to commanding compliance with the LB and CPR orders, the District Court reviewed these FTC programs under the criteria and summary procedures applicable to judicial enforcement of compulsory process by administrative agencies set forth by the Supreme Court in *United States* v. *Morton Salt Co.*,[89] and by this court in *FTC* v. *Texaco, Inc.*[90] Appellants contend that a higher standard of review and a plenary review preceeding was required on the theory that the LB and CPR programs are "agency action" subject to the arbitrary and capricious standard of Section 706(2) of the

[87] 15 U.S.C. § 49 (1976), which states, in part, that "the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of this subchapter or any order of the Commission made in pursuance thereof."

[88] 15 U.S.C. § 46(b) (1976).

[89] 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

[90] 180 U.S.App.D.C. 390, 555 F.2d 862 (en banc), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977). See 432 F. Supp. at 313-316 for the District Court's analysis.

Administrative Procedure Act.[91] We reject this argument because in our view the limited scope of review found by the Supreme Court and this court to be appropriate for compulsory process enforcement is applicable to enforcement of the Section 6(b) report orders being enforced in this proceeding.

In *United States* v. *Morton Salt Co.*,[92] the Supreme Court reviewed Federal Trade Commission orders requiring salt producers to file informational reports designed to determine whether these corporations were complying with a

[91] 5 U.S.C. § 706(2) (1976). The District Court solicited supplemental memoranda on the agency action issue, and concluded that the LB and CPR programs are not "agency action" within the meaning of Section 706(2), and even if so considered, are not arbitrary, capricious, and abuse of discretion, or otherwise not in conformance with the standards of this Section. 1977-2 Trade Cas. at 72,143-72,146. As the District Court stated,

> The court has a limited role to play, however, in reviewing agency action to determine whether it is arbitrary or capricious. This court cannot merely substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). Rather, after a searching and careful inquiry, the court should determine whether the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment.

*Id.* at 72, 146. We agree with the District Court that the record of the administrative consideration of the LB and CPR programs reflects an extensive consideration of the problems posed by the development of these surveys. In addition, we reject as frivolous appellants' assertion that the District Court's ruling was procedurally deficient because it ruled on appellants' challenge to the composition of the administrative record at the same time it rejected appellants' claim of arbitrary and capricious agency action. Since the District Court rejected appellants' claim that the administrative record was incomplete, there was no change in the composition of the record which could possibly have prejudiced appellants in their ability to present their arguments with respect to the agency action issue.

[92] *Supra* note 89.



court order to cease and desist certain unfair trade practices. These FTC orders were issued pursuant to Section 6(b) of the Federal Trade Commission Act, the same authority invoked by the Commission here. Appellants, nevertheless, would have us find *Morton Salt* inapposite because the report orders in *Morton Salt* were part of a focused FTC investigation, whereas the LB and CPR orders are incident to general statistical surveys. The FTC's authority to require reports under Section 6(b) is not limited to pursuing a focused theory of unlawful activity. The Supreme Court in *Morton Salt* discussed the nature and scope of this authority in some detail.

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[93]

The Court went on to state that the purpose of the investigation may be nothing more than to satisfy "official curiosity," because "law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."[94] Indeed,

[93] *Id.* at 642-643, 70 S.Ct. at 363-364, 94 L.Ed. at 410-411.

[94] *Id.*

as we noted in *FTV* v. *Texaco, Inc.*, the investigative power of the Commission may be used to reveal the need for changes in the law for the purpose of making recommendations to Congress.[95] The Commission's purpose in conducting the LB and CPR surveys falls clearly within the purview of its broad investigative powers under Section 6(b). The objective of the Line of Business program is described in the following Commission statement:

> [T]he Federal Trade Commission has made a vigorous effort in recent years to improve the effectiveness of its law enforcement resources allocations for antitrust and consumer protection. One consequence has been a shift toward investigations and cases which are industry-wide in scope. To choose as wisely as possible which industry-wide investigations best serve the public interest, accurate industry-by-industry performance information is needed. The Commission's efforts in this respect have been hampered by the decline over time in the quality of the information available. The Line of Business program was conceived to help fill those information needs.[96]

Similarly, the Commission states that the CPR data banks will be used for "enforcement efforts, economic studies, and policy planning activities."[97] Thus, as to both programs, the FTC seeks to establish data banks for use in targeting areas for investigating and enforcement efforts.

Although the investigative powers of the regulatory agencies are broad, they are not unlimited, and are subject to judicial review "[t]o protect against mistaken or arbi-

[95] 15 U.S.C. § 49 (1976). See *FTC* v. *Texaco, Inc.*, *supra* note 90, 180 U.S.App.D.C. at 403 n.28, 555 F.2d 875 n.28.

[96] LB Supporting Statement, *supra* note 6, at 2 (LB App. 717).

[97] CPR Supporting Statement, *supra* note 19, at 2 (CPR App. 257).



trary orders."[98] As we stated in *Texaco*, however, "while the court's function is 'neither minor nor ministerial,' *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 217 n.57, the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity."[99] The agency's investigative order, whether it is a subpoena or an information-report order, must be enforced if it does not transcend the agency's investigatory power, the demand is not unduly burdensome or too indefinite, and the information sought is reasonably relevant.

2. The Relevance and Burdensomeness Determinations.

The corporate appellants argue that if the FTC report orders are summarily enforceable as ordinary compulsory process, as we have concluded they are, the District Court erred in evaluating the relevance and burdensomeness of the Line of Business orders.[100] We understand appellants to make three claims. First, that the District Court failed to determine that the LB data sought was relevant to the agency's general purpose as required by *Texaco*. Second, that it was error for the District Court to decide the question of burdensomeness on the basis of five corporate affidavits and the testimony of two corporate witnesses. And finally, that the Court erred in considering relevance and burdensomeness independently.

As recognized in *Texaco*, relevance is to be measured against the agency's general purpose in gathering the in-

[98] *United States* v. *Morton Salt Co.*, *supra* note 89, 338 U.S. at 640, 70 S.Ct. at 362-363, 94 L.Ed. at 409.

[99] *Supra* note 90, 180 U.S.App.D.C. at 400, 555 F.2d at 872.

[100] Appellants do not raise this objection in connection with the District Court's enforcement of the Corporate Patterns Report orders.

vestigative material.[101] The District Court found that "the record in this action provides an ample basis for drawing the limited conclusion, without further evidentiary hearing, that the data sought in the LB program is not totally useless. . . ." [102] If anything, the District Court was too guarded in its assessment of the relevance of the LB data. Indeed, in our review, the record reflects that the Line of Business data sought is reasonably relevant to the Commission's general purpose of collecting corporate financial information in order to assess industry-by-industry performance and market structure.[103] As we are assured that the FTC surveys satisfy this degree of relevance, we need not decide if a lesser standard would suffice.

The next question is whether the District Court abused its discretion in determining that the Line of Business reporting requirements do not impose an undue burden on the respondent corporations.[104] As we indicated in *Texaco,* the onus of demonstrating that a request is unduly burdensome is the corporation's.[105] When the inquiry is conducted

[101] *Supra* note 90, 180 U.S.App.D.C. at 402, 555 F.2d at 874.

[102] 1977-2 Trade Cas. at 72,146.

[103] The critics of the LB program and the FTC agree that the design of the LB survey and the definition of market categories are not perfectly suited for collecting data that will infallibly reflect market conditions. But we do not hold the FTC to a standard of perfection in assessing the relevance of their effort. The complex problems of designing this type of statistical program have been and will continue to be the focus of extensive efforts by the Commission to improve the survey. In the meantime, it is not disputed that the LB data that the FTC receives will be the only corporate financial performance data available in terms of uniform market categories. We defer to the Commission's expertise in concluding that this information is necessary and useful to performance of its regulatory responsibilities.

[104] See *FTC* v. *Texaco, Inc., supra* note 90, 180 U.S.App.D.C. at 409 & n.45, 555 F.2d at 881 & n.45.

[105] *Id.*



pursuant to a lawful purpose and the request is relevant to that objective, its reasonableness will be presumed absent a showing that compliance threatens to disrupt or unduly hinder the normal operations of a business.[106] Concerned that the administrative record was insufficient to permit resolution of the question of burdensomeness, and in view of the corporations' representations that they might lay an adequate evidentiary foundation with financial presentations from a "small number" of their group, the District Court invited the corporate parties to submit five affidavits on the cost of compliance with each of the two reporting programs.[107] In addition, a hearing was held at which all of the affiants were summoned to present oral testimony.[108] The District Court concluded that, assuming the accuracy of the most extravagant cost estimates, the costs of compliance were *de minimis* relative to the overall corporate operating budgets.[109] We think that under the circumstances appellants were extended ample opportunity to establish their claims of burdensomeness, and we are unable to perceive any error in the District Court's assessment of the inadequacy of their showing in that regard.

Finally, appellants have failed to persuade us that the District Court erred in its refusal to disregard the long

[106] *Id.* at 410, 555 F.2d at 882.

[107] 432 F.Supp. at 315 & n.61. The corporations chose not to file affidavits with respect to the cost of complying with the CPR orders, 1977-2 Trade Cas. at 72,148.

[108] 1977-2 Trade Cas. at 72,148. Although all five affiants were invited to present oral testimony, the corporations elected to present only two.

[109] 1977-2 Trade Cas. at 72,151-72,152 (Findings of Fact ¶ 15).

and consistent line of authority supporting independent consideration of relevance and burdensomeness.[110]

3. Enforcement Procedures.

The corporations further argue that enforcement of the FTC's report orders by summary mandamus procedures violates Federal Rules of Civil Procedure 81(a)(3) and 81(b), which, they contend, require full compliance with the federal rules, including commencement of suit by the filing of a complaint and the issuance of a summons in a plenary proceeding.[111]

Rule 81(b) abolishes the writ of mandamus and provides that relief in the nature of mandamus may be obtained "by

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[110] *E.g., United States* v. *Morton Salt Co., supra* note 89; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *FTC* v. *Texaco, Inc., supra* note 90.

The single statement of the Fifth Circuit in *Genuine Parts Co.* v. *FTC,* 445 F.2d 1382, 1391 (5th Cir. 1971), that the burden of compliance was particularly reasonable in light of the fact that the portion of the order objected to was "the very heart of the inquiry," does not suggest to us a change from the traditional bifurcated analysis.

[111] Appellants have filed a supplemental brief advancing the argument that as a result of the FTC's filing a petition instead of a complaint in the District Court, "the district court never obtained subject matter jurisdiction and its final order granting mandatory relief is a nullity."

Brief by Goodyear Tire, *et al.* at 14. This argument is totally lacking in merit. The Supreme Court has stated:

> We think so long as the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed, . . . any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment. See 2 J. Moore, Federal Practice ¶ 3.06[1], pp. 731-732 (2d ed. 1974).

*Schlesinger* v. *Councilman,* 420 U.S. 738, 742 n.5, 95 S.Ct. 1300, 1305 n.5, 43 L.Ed.2d 591, 599 n.5 (1975).



appropriate action or by appropriate motion." [112] It is clear that the substitution of motion and action practice for writ practice has not abolished the remedy of mandamus.[113] Appellants contend, however, that Rule 81(a)(3),[114] which permits district courts to deviate from the rules in subpoena enforcement cases, compels by implication full application of the rules in other types of mandamus proceedings. The Notes of the Advisory Committee belie appellants' suggestion that this rule was intended to create only a narrow exception to the comprehensive application of the rules in mandamus proceedings. The Committee stated that "although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired [citations omitted], it is drawn so as to permit application whenever the district court deems them useful." [115] Moreover, the decided cases are contrary to appellants' position. The District Court,[116] in rejecting the corporations' argument, followed the line of decisions in this

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[112] Fed. R. Civ. P. 81(b) states:

> (b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

[113] 7 J. Moore, Federal Practice ¶ 81.07, at 81-96 (2d ed. 1975).

[114] Fed. R. Civ. P. 81(a)(3) provides, in pertinent part:

> These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

[115] See Notes of Advisory Committee on Rules, Fed. R. Civ. P. 81, 28 U.S.C.A. Rule 81 at 30-31 (1960).

[116] 432 F.Supp. at 280-283.

jurisdiction [117] endorsing the position first delineated in *United States* v. *Associated Merchandising Corp.*:

> As a general rule, district courts do not issue directions in the nature of mandamus except in aid of jurisdiction already acquired. . . . However, where the Court was able to discover a congressional authorization for use of a writ of mandamus, it approved the issuance upon a petition of a peremptory writ. [citations omitted] By [Section 9 of the FTC Act] Congress has expressly conferred jurisdiction to issue a writ of mandamus. Therefore, it seems clear that Congress has expressly authorized the court to proceed summarily to enforce orders of the Federal Trade Commission for the production of documents.[118]

We find the very thin thread of logic offered by appellants insufficient to support their argument that summary mandamus enforcement proceedings for FTC report orders is prohibited by unyielding adherence to the Federal Rules of Civil Procedure.

4. Confidentiality Claims.

Appellants ask to be excused from complying with the LB and CPR orders because of potential jeopardy to confidential information sought by the Commission if LB and CPR data or data aggregates are published.[119] The District

[117] *Emerson Electric Co.* v. *FTC*, Misc. No. 76-0002 (D.D.C. July 21, 1976); *FTC* v. *Jorgensen*, Misc. No. 75-46 (D.D.C. May 16, 1975); *FTC* v. *Sherry*, 1969 Trade Cas. 87,452 (D.D.C. 1969).

[118] 256 F.Supp. 318, 321 (S.D.N.Y. 1966).

[119] 15 U.S.C. § 46(g) (1976) states that the Commission shall have the power

> [t]o make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.



Court held that appellants' confidentiality claims are premature prior to a final Commission decision to publish the data from these surveys and are improperly presented to the Court prior to exhaustion of administrative remedies.[120] Moreover, as noted by the District Court, even if appellants' claims were meritorious, they would not excuse compliance with the Commission order to supply information to the agency.[121] To ensure efficacious assertion of future claims with respect to the release of CPR data, the District Court issued a protective order obligating the FTC to provide ten days notice to companies prior to publication of CPR data for which confidential treatment had been requested and denied.[122] No protective order was issued with regard to the Line of Business data. We uphold the District Court in all respects.

Relying on the Supreme Court's opinion in *FTC* v. *Schreiber*,[123] this court stated recently in *FTV* v. *Texaco, Inc.* that "it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality." [124] In light of this principle, we noted as a general rule that until the subpoenaed information has been tendered to the agency and it has had the opportunity to rule on specific requests for confidential treat-

[120] 1977-2 Trade Cas. at 72,146 n.7; 432 F.Supp. at 311-312.

[121] See *Electric Bond Co.* v. *SEC*, 303 U.S. 419, 438, 58 S.Ct. 678, 685, 82 L.Ed. 936, 946 (1938).

[122] July 11, 1977 order (LB App. 269).

[123] 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965).

[124] *Supra* note 90, 180 U.S.App.D.C. at 412 n.62, 555 F.2d at 884 n. 62. See also *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-464, 82 L.Ed. 638, 643-644 (1938).

ment, broad protective orders are "premature and improper." [125]

Appellants contend that if the Commission decides to publish aggregate Line of Business statistics that these figures may be subject to disaggregation, thereby revealing confidential individual company data. This argument is premature and improper for several reasons. First, the Commission has already promulgated regulations to ensure the confidential treatment of the 1974 Line of Business information.[126] They provide, in part, that the LB data shall be used only to compile statistical reports.[127] In addition, the FTC is required by its regulations to compile these reports in a fashion that precludes identification of individual company data.[128] The regulations further direct the Commission to develop procedures sufficient to prevent improper disclosure of LB data supplied by a particular reporting company.[129] Appellants assertion that their individual LB data will be identifiable if LB aggregates are made public assumes that the FTC will forsake its own regulations.

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[125] *FTC* v. *Texaco, Inc.*, *supra* note 90, 180 U.S.App.D.C. at 412, 555 F.2d at 884.

[126] *Id.*

[127] Confidentiality Rules and Procedures for the 1974 Reporting Year, 40 Fed. Reg. 42243 (1975) (LB App. 710).

[128] *Id.*

[129] *Id.* In addition, the publication or release of any data submitted to the FTC is subject to a number of statutes. The FTC Act, 15 U.S.C. § 46(f) (1976), prohibits the Commission from publishing trade secrets obtained in its information-gathering activities. It is a criminal offense for any Commission employee to make public any confidential information obtained by the Commission, 15 U.S.C. § 50 (1976); 18 U.S.C. § 1905 (1976). For discussion of precautions taken to ensure the security of LB data, see Hearings on Appropriations for the Department of State, Justice and Commerce, the Judiciary, and Related Agencies for 1977 Before a Subcomm. of the Senate Comm. on Appropriations, 94th Cong., 2d Sess., pt. 4, at 128-130 (1976).



We reject this contention as contrary to the well-established presumption of administrative regularity.

Second, the Commission has invited reporting companies to lodge with their LB reports special requests indicating why their reported data may be especially vulnerable to identification if included in published aggregates.[130] Appellants must first exhaust their administrative avenues for relief before resorting to the courts for their remedy.[131] In light of the numerous administrative safeguards and avenues for relief, we conclude that a protective order is unnecessary and was properly denied by the District Court with respect to the Line of Business program.

In the CPR appeal, appellants contend that the CPR data constitutes "trade secrets" barred from publication by Section 6(f) of the FTC Act.[132] The District Court properly concluded that it was premature to reach the merits of appellants' trade secret claim because the Commission has made no final decision to publish individual CPR data.[133] Furthermore, as with the claims of confidentiality of the LB data, appellants may demonstrate to the FTC that their CPR data requires special protection and upon receipt of the CPR data, the Commission may rule favorably on particular pleas for confidential treatment. Since the CPR appellants' claims involve the potential release of their individual company data, the District Court decided that a protective order was appropriate "[i]n order to protect the corporate parties from any precipitous action on the part of the FTC" before appellants could ex-

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[130] Statement of the Commission on Motions to Quash the Orders to file the 1974 Line of Business Form at 10 (LB App. 887); Statement of the Commission (on renewed motions to quash) at 4 (LB App. 558).

[131] See note 124, *supra*.

[132] 15 U.S.C. § 46(f) (1976).

[133] 432 F.Supp. at 311-312.

haust their administrative remedies.[134] The District Court's order—much like the one issued by this court in *Texaco*[135]—requires the Commission to furnish ten days notice of a decision to publish individual company data.[136] Although we stated expressly in *Texaco* that such an order is not required as a general rule, we think the District Court's issuance of a protective order under the circumstances at bar was well within its discretion.[137] In sum, the trial court's disposition of the CPR appellants' trade secrets claim was unimpeachable in all respects.

5. Claims of the Adjudicative Appellants.

Nine of the appellant corporations who are respondents in adjudicative proceedings styled *In the Matter of Exxon Corporation, et al.* and *In the Matter of Kellogg Co., et al.*[138]

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[134] *Id.* at 312.

[135] 180 U.S.App.D.C. at 412, 555 F.2d at 884.

[136] *Supra* note 130.

[137] 180 U.S.App.D.C. at 412 n.64, 555 F.2d at 884 n.64.

Appellants Miliken & Company and Allen-Bradley Company have filed a supplemental brief asserting their special interest in the asserted failure of the Commission and the District Court to protect adequately the confidentiality of the LB and CPR data. These privately-held companies aver that the danger of disclosure of their financial data is especially grave because they are not subject to the SEC's reporting requirements applicable to public corporations. While there may be a unique facet to the confidentiality claims of the nonpublic corporations subject to the FTC surveys, these claims, like the confidentiality claims of the other appellant corporations, are nevertheless premature and without merit in this litigation.

[138] Atlantic Richfield Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Standard Oil of California, Standard Oil Company (Indiana) and Texaco, Inc. are respondents in *In the Matter of Exxon Corporation, et al.*, FTC Docket 8934. General Mills, Inc. is a respondent in *In the Matter of Kellogg Company, et al.*, FTC Docket 8883.



(hereinafter, adjudicative appellants or adjudicative corporations) raise separate claims of error with respect to the possible use of the LB and CPR data by the Commission's complaint counsel in those proceedings. The corporations' underlying assertion is that complaint counsel might obtain the LB and CPR data for use in the adjudications without complying with the Commission's discovery procedures, thereby violating appellants' rights under the due process clause, the Administrative Procedure Act and the Commission's own rules of practice. Essentially the same claim was made by one of the adjudicative appellants, Atlantic Richfield, in a case recently before this court, *FTC* v. *Atlantic Richfield Company*.[139] This court, concluding that there was no clear Commission determination of whether FTC rules of practice permitted access by Commission prosecutors to investigatory materials outside the discovery process, remanded the case with instructions to the Commission to interpret its own rules in the first instance.[140] The Commission on June 2, 1978, completed its

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[139] —— U.S.App.D.C. ——, 567 F.2d 96 (1977).

[140] *Id.* at ——, 567 F.2d at 106.

In *FTC* v. *Atlantic Richfield Co.* this court required sequestration of the investigative documents pending the Commission's interpretation of its rules as required on remand in order to ensure that discovery in the FTC adjudicative proceeding proceed according to the Commission's interpretation of its rules. 567 F.2d at 106-107. Following the issuance of *Atlantic Richfield* on July 25, 1977, the adjudicative corporations moved the District Court to amend its final order and judgment by fashioning a sequestration order similar to the one issued in *Atlantic Richfield*. See 1977-2 Trade Cases 72,420 (D.D.C. July 29, 1977). In response the Commission committed to prevent access, outside normal discovery process, by complaint counsel to either the LB or CPR reports or to any unpublished aggregate data based on such reports pending the Commission's interpretation of its rules. Letter from Carol M. Thomas, Secretary to the FTC, to Robert G. Jordon, III (July 29, 1977) (LB App. 2781). We agree with the District Court that the FTC's voluntary commitment to sequester the LB and CPR data to the same extent required by this court's order in *Atlantic Richfield* was adequate.

task and concluded that its rules for adjudicative proceedings do not prevent access by complaint counsel to documents and information otherwise properly obtained by the Commission without leave of the Administrative Law Judge in charge of the adjudication and without notice to the adjudicative respondent.[141]

Adjudicative appellants contend that the LB and CPR orders should not be enforced as to them because of the potential for allegedly unlawful use of the LB and CPR data in the adjudicative proceedings. We agree fully with the District Court that these claims do not go to the question of enforcement because "the potential jeopardy of procedural rights in the adjudicative proceedings cannot impinge upon the FTC's right to collect the information in question, only upon the use to which the information might be put."[142] The claims presented by the adjudicative appellants relate not to their rights with respect to the the Line of Business and Corporate Patterns Report surveys but rather to claimed rights in the adjudicative proceedings currently pending at the FTC. These assertions must be made first in those administrative proceedings and then pursued, if necessary, in the administrative and judicial avenues of appeal. As this court has stated clearly in *Atlantic Richfield*:

> Subsequent to the Commission's interpretation of its rules, all the legal questions which Atlantic wishes to raise will be comprehended within the *Exxon* adjudicatory proceeding, and dealt with by the Administrative Law Judge . . . .
>
> If Atlantic is dissatisfied with the Commission's construction of its rules, Atlantic can raise these claims

[141] *In the Matter of Subpoena Duces Tecum Addressed to Atlantic Richfield Co., et al.*, FTC Docket No. 741-0019.

[142] 432 F.Supp. at 313. See note 121, *supra*.



> in the context of an appeal from the final decision of the agency in the adjudicative proceeding.[143]

The present litigation is no more appropriately suited to resolution of any claims that the corporations may wish to raise with respect to the Commission's interpretation of its rules than were the proceedings in *Atlantic Richfield*. Raising these issues at this juncture is improper, and, accordingly, we affirm the District Court's order.

C. *The Comptroller General's Review.*

Appellants' final allegation of error is that the Comptroller General's approval of the Line of Business form [144] was defective because it was premised on a misunderstanding of the criteria for review established by Section 3512 of the Federal Reports Act.[145] This statute requires the independent regulatory agencies to submit proposals for the collection of information from ten or more persons to the Comptroller, who must review the form and advise the agency within 45 days whether it satisfies the requirements of the Federal Reports Act.

[143] *Supra* note 139, 567 F.2d at 107.

[144] The Corporate Patterns Report form was submitted to the Comptroller General by the Federal Trade Commission on January 23, 1975. The Comptroller published a notice of the proposed survey in the Federal Register on January 31, 1975, 40 Fed. Reg. 4689, soliciting written comments from all interested parties. In a letter dated March 24, 1975 from Monte Canfield, Jr., Director of the General Accounting Office, to FTC Chairman Lewis A. Engman the CPR form was cleared for use by the FTC (CPR App. 777). Although the GAO expressed concern about the "meaningfulness" and confidentiality of the CPR data sought, it did not consider these reservations to be a basis for denying clearance under the review provisions of the Federal Reports Act.

The corporate parties raise no objection to the Comptroller's clearance of the CPR form.

The Comptroller construes Section 3512 of the Federal Reports Act as establishing two criteria for review of data-collection plans. These two criteria are set forth in Section 3512(b), which states:

> In carrying out the policy of this section, the Comptroller General shall review all existing information gathering practices of independent regulatory agencies as well as requests for additional information with a view toward—
>
> (1) avoiding duplication of effort by independent regulatory agencies, and
>
> (2) minimizing the compliance burden on business enterprises and other persons.[146]

In approving the LB form, the Comptroller specifically found that the information sought was not available to the FTC from another federal source and that the Commission

[146] *Id.* § 3512(b). Great weight must be given to an agency's interpretation of its statutory mandate. See *Chemehevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-410, 95 S.Ct. 1066, 1075-1076, 43 L.Ed.2d 279, 289-290 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165-166 (1971); *Red Lion Broadcasting Co* v. *FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371, 384 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965).

Appellants suggest that the Comptroller's clearance regulations reflect a contemporaneous interpretation of § 3512 that includes a third statutory review criterion, "appropriateness." The regulations simply refer to a determination that the forms are "appropriate for collection of the information sought," 4 C.F.R. §§ 10.7, 10.12 (1976). We find no greater support for appellants' expansive construction of this language in the regulations than in the statute itself. Moreover, the agency's statement at the time these regulations were proposed reflects a contemporaneous interpretation of the statute by the Comptroller that comports with his present view, and to which we give the appropriate deference. 39 Fed. Reg. 2436 (1974).



had sufficiently minimized the respondents' burden of compliance with the reporting requirement.[147]

Appellants argue that the Comptroller was obliged to determine additionally that the data sought was "appropriate" to the FTC's expressed need. This third criterion of review, appellants contend, is imposed implicitly by Section 3512(d) of the Federal Reports Act, which states:

> While the Comptroller General shall determine the availability from other Federal sources of the information sought and *the appropriateness of the forms for the collection of such information,* the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information. (emphasis added)[148]

The determination of appropriateness in this context, appellants suggest, should entail a substantive evaluation of the requested data to establish that it meets "some mini-

[147] Letter from Monte Canfield, Jr., Director of the General Accounting Office, to FTC Chairman Engman (Aug. 18, 1975) (LB App. 798-802).

On July 1, 1975 the FTC submitted the 1974 LB form to the Comptroller (LB App. 2025). The GAO published the proposed form in the Federal Register on July 8, 1975, 40 Fed. Reg. 28677, soliciting comments from interested persons. The 1974 LB form was cleared for use by the FTC in a letter dated August 18, 1975 from Monte Canfield, Jr., Director of the GAO, to FTC Chairman Engman (LB App. 798-802). See Affidavit of Carl F. Bogar, Asst. Director, Procurement Systems & Acquisition Div., GAO (LB App. 2019).

The Comptroller's August 18 letter indicated that revisions in the LB form for 1973 had improved, in the Comptroller's view, the meaningfulness of the data to be collected. The Comptroller expressly indicated, however, that his views were advisory and not within the standards of review provided by § 3512 (LB App. 801-802).

[148] 44 U.S.C. § 3512(d) (Supp. V 1975).

mum standard of meaningfulness and reliability in terms of the agency's stated need." [149] We need appellants' argument at odds with both the language and the legislative history of Section 3512 of the Federal Reports Act.

Section 3512 was added to the Federal Reports Act in 1973 to create a special review procedure for the data-collection plans of the federal regulatory agencies.[150] Prior to the 1973 amendment, the regulatory agencies were subject to the clearance authority of the Office of Management and Budget (OMB), which continues to serve this function *vis-a-vis* nonregulatory agencies.[151] Congress' express purpose in establishing a different review process for the regulatory agencies was

> to insure that the existing clearance procedure for questionnaires or requests for data does not become, inadvertently or otherwise, a device for delaying or obstructing the investigations and data collection necessary to carry out the important regulatory functions assigned to the independent agencies by the Congress.[152]

Prior to the 1973 amendment, the OMB possessed authority to undertake a substantive appraisal of the data that a regulatory agency sought and to bar collection upon a finding that the data were not necessary for effectuation of the agency's function or particular program's purpose.[153]

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[149] Joint Appellants LB Brief at 72.

[150] Pub. L. No. 93-153, Title IV, § 409(b), 89 Stat. 593 (1973), codified at 44 U.S.C. § 3512 (Supp. V 1975).

[151] *Id.* The OMB's clearance authority is defined by 44 U.S.C. §§ 3501-3511 (Supp. V 1975).

[152] H.R. Rep. No. 93-624, 93d Cong., 1st Sess. 31 (1973).

[153] 44 U.S.C. § 3586 (Supp. V 1975) provides:

> Upon the request of a party having a substantial interest, or upon his own motion, the Director of the Bureau of the Budget may determine whether or not the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency or for any other proper purpose. Before making a determination, he may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason, the agency may not engage in the collection of the information.



Congress regarded the evaluation of the regulatory agency's need for data as essentially a policy determination and considered the reviewing agency's veto power as a source of interference with the independence of the regulatory agencies.[154] So in creating a separate clearance procedure for these agencies, Congress specifically provided in Section 3512(d) that "the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information." [155] Appellants' construction of "appropriateness" as a requirement that the Comptroller evaluate the data sought in terms of the agency's need is untenable in light of this provision reserving for the agency the determination as to the necessity of the information in carrying out its statu-

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[154] Senator Bentsen, author of the enacted amendment, made the following statement on the Senate floor at the time of the amendment's passage:

> Unlike the previous oversight by OMB the GAO (Comptroller) would not make the final decision as to whether the information was needed. That decision would be left with the independent agency. My feeling was that if the General Accounting Office were given veto power over whether information was needed, it is putting them in the policy-decision framework, and I do not think that should be done.

119 Cong. Rec. 24085 (1973). See also *id.* at 23884-23885.

[155] 44 U.S.C. § 3512(d) (Supp. V 1975).

tory responsibilities.[156] We therefore agree with the District Court [157] and the Comptroller General that the term "appropriateness" serves as merely a shorthand reference to the requirement of Section 3512(b) [158] that the Comptroller inspect the regulatory agency's information-gathering proposal with a view toward minimizing compliance burden.[159]

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[156] Statutes must be construed when possible to avoid disharmony among their provisions.

[157] 432 F.Supp. 307-310 (LB App. 227-30).

[158] 44 U.S.C. § 3512(b) (Supp. V 1975) quoted in full, text *supra* at 50-51.

[159] Appellants suggest an alternative theory of statutory construction in support of their claim that the Comptroller is required to analyze the meaningfulness or reliability of the requested data to the agency's stated need. They suggest that the burden inquiry of § 3512(b) should entail a "cost-benefit" analysis balancing the cost to the reporting companies with the benefit to the agency. Since the result of appellants' assertion is inconsistent with the delegation to the agency of the determination of its necessity for the data, we reject the "cost-benefit" theory on the same grounds on which we relied to repect the "appropriateness" theory.

The Commission and the Comptroller raise several additional issues. Both contend that the Comptroller's actions under the Federal Reports Act are not subject to judicial review. Their argument is that by limiting the period of time in which the Comptroller can review regulatory information-gathering forms to 45 days, 44 U.S.C. § 3512(d) (Supp. V 1975), Congress intended to preclude judicial review. See *Morris* v. *Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977); *Harris* v. *Bell*, —— U.S. App. D.C. ——, 562 F.2d 772 (1977). The Commission also suggests that the Comptroller's clearance function is agency action committed to agency discretion and therefore exempt from judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976). The District Court rejected this argument, 432 F.Supp. at 307-308. But see *General Electric Co.* v. *FTC*, 411 F.Supp. 1004, 1006 (N.D.N.Y. 1976); *Westinghouse Electric Corp.* v. *FTC*, 1976-1 Trade Cas. 68,815 (S.D. Ohio 1976). The Commission also suggests that the express purpose of the Federal Reports Act to protect "especially small business enterprises," 44 U.S.C. § 3512(a) (Supp. V 1975), excludes the large corporate appellants from the



## III. Conclusion

The judgment of the District Court is affirmed. The corporate parties shall comply with the Line of Business and Corporate Patterns Report orders as issued by the Federal Trade Commission within 30 days of the date of this opinion.

*So ordered.*

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Act's zone of interest, thereby depriving them of standing to challenge the Comptroller's clearance of the LB form. See *Barlow* v. *Collins*, 397 U.S. 159, 90 S. Ct. 832, 25 L.Ed 2d 192 (1970). Finally, the Commission contends that the challenge to the Comptroller's clearance is not properly raised as a defense in an enforcement proceeding, *FTC* v. *Texaco, Inc.*, *supra* note 90, 180 U.S.App.D.C. at 407, 555 F.2d at 879. Since we conclude that the arguments made by the corporations with respect to the Comptroller's exercise of his review and clearance authority under the Federal Reports Act are clearly lacking in merit, we need not consider the various theories propounded by the FTC and the Comptroller.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASTER FILE MISC. No. 76-0126

IN RE FTC CORPORATE PATTERNS REPORT LITIGATION,

THIS DOCUMENT RELATES TO:
ALL ACTIONS—MASTER FILE ONLY

MASTER FILE MISC. No. 76-0127

IN RE FTC LINE OF BUSINESS REPORT LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS—MASTER FILE ONLY

(Filed January 31, 1977)

**Memorandum Opinion and Order**

This matter arises before the court in a number of consolidated enforcement and preenforcement cases. These actions concern the Federal Trade Commission's information-gathering activities in connection with the Line of Business Program (LB) and the Corporate Patterns Report Survey (CPR). The consolidated cases include the FTC's enforcement action against various corporations that have failed to comply with Commission orders requiring them to file the 1974 Form LB,[1] the FTC's enforcement action against various corporations that have failed to comply with Commission orders requiring them to file CPR forms,[2] preenforcement actions concerning the LB Program filed against the FTC, certain FTC Commissioners, and the Comptroller General by a number of companies in the District of Delaware later transferred to this court, preenforcement actions concerning the CPR Survey filed against the FTC, certain FTC Commissioners, and the Comptroller General by a number of companies in the District of Delaware later transferred to this court, and similar actions concerning the LB Program and the CPR Survey originally filed in the Southern District of New York and later transferred to this court.

[1] FTC v. A. E. Staley Mfg. Co., Misc. No. 76-0080.

[2] FTC v. Air Products & Chemicals, Inc., Misc. No. 76-64.



Pursuant to this court's order of July 30, 1976, the parties have completed the filing of and opposition to all motions that should be decided by the court at this time. In addition, the parties have submitted outlines detailing the discovery or evidentiary hearings they believe necessary before the court can rule on the merits of a claim or defense. In light of the volume of the pleadings in this case,[3] the court could not hope to grapple with all the pending motions at one time. Accordingly, the court held an oral hearing on four pending motions on January 7, 1977: the corporate parties' motion to dismiss the LB and CPR enforcement actions, the FTC's motion to dismiss the LB and CPR preenforcement actions, the Comptroller General's motion to dismiss the LB and CPR preenforcement actions, and the FTC's motion for a more definite statement of counterclaims. Each motion is discussed in turn, and an appropriate order follows this memorandum opinion.

## I. CORPORATE PARTIES' MOTION TO DISMISS

The corporate parties move to dismiss the enforcement actions concerning the LB and CPR orders for lack of jurisdiction. The corporate parties proffer three basic arguments in support of their motion: (1) the FTC can obtain mandatory relief only through a civil action pursuant to the *Federal Rules of Civil Procedure*, and the court thus has no matter pending; (2) the FTC must bring any enforcement claims against preenforcement plaintiffs as compulsory counterclaims; and (3) the court does not have personal jurisdiction over several respondents in the enforcement proceeding. For the reasons set forth below, the court must deny or defer the corporate parties' motion to dismiss.

[3] The court wishes to note that the parties have simplified the court's task enormously by submitting consolidated pleadings wherever possible.

A. *Civil Action v. Summary Procedure*

The corporate parties contend that the FTC can obtain relief in the enforcement proceedings only through institution of a normal civil action pursuant to the *Federal Rules of Civil Procedure.* The FTC has not followed the usual complaint-summons-service procedure for institution of a civil suit; instead the Commission has employed a petition-show cause order approach, purportedly under the authority of section 9 of the Federal Trade Commission Act.[4] Its goal is a mandamus remedy under that section. The corporate parties' argument on the ability of the FTC to obtain a mandamus remedy in a special reports order case under section 9 is a simple one. They contend that Rule 81(b) of the *Federal Rules of Civil Procedure,*[5] abolishing the writ of mandamus, must control over any inconsistent practice under section 9 predating the adoption of the *Rules.* Indeed, section 1 of the Rules Enabling Act, 28 U.S.C. § 2072, provides that all "laws in conflict with such rules shall be of no further force or effect . . . ."

This argument correctly states the law, but does not go far enough. Rule 81(b) merely abolished the *writ* of mandamus and not the remedy; mandamus relief now is available "by appropriate action or by appropriate motion." The effect of Rule 81(b) therefore is not earthshaking since it

[4] Section 9, 15 U.S.C. § 49, provides in relevant part:

> Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

[5] Rule 81(b) provides:

> The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.



merely substitutes in place of the writ practice an action or motion under the *Rules.* 7 J. Moore, *Federal Practice* Par. 81.07, at 81-96 (2d ed. 1975). The corporate parties attempt to complete the circle of their argument by noting that a motion or action for mandamus must occur, in light of Rule 81(b), within the context of the *Rules.* They argue that the FTC has neither commenced an action nor made a motion under the *Rules.* To commence an action requires a complaint and summons, and to make a motion requires a pending case, in the corporate parties' view. This argument holds some logic and appeal, but the issue does not reach this court as a question of the first impression.

The corporate parties concede that the FTC may obtain summary enforcement of its *subpoena* orders. They contend, however, that Rule 81 contemplates separate treatment for subpoena order enforcement. Indeed, Rule 81(a)(3) leaves some discretion in the court in subpoena cases.[6] The corporate parties admit that a court has the "discretion to be flexible" in the application of the *Rules* to subpoena enforcement cases. They note that the *Rules* contain no similar allowance rendering the application of the *Rules* discretionary when mandamus relief is sought, however; the express authorization of Rule 81(a)(3) renders subpoena cases inapposite to the mandamus cases facing the court here. Again, the corporate parties have presented a logical argument,[7] but there exist a number of cases pur-

[6] The final sentence of Rule 81(a)(3) provides:

> These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a *subpoena* issued by an officer or agency of the United States under any statute of the United States *except as otherwise provided* by statute or by the rules of the district court or *by order of the court in the proceedings.* (emphasis supplied)

[7] The FTC places great reliance on the parallel treatment accorded subpoena enforcement and mandamus enforcement under section 9 of the FTC Act. Indeed, this parallel treatment by Congress of subpoenas and orders has continued in the Magnuson-Moss

porting to apply a summary procedure in mandamus cases as well as subpoena cases.

Courts began to grapple with the question of summary mandamus procedures in enforcement of FTC orders in the case of *United States* v. *Associated Merchandising Corp.*, 256 F. Supp. 318 (S.D. N.Y. 1966). The court in *Associated Merchandising* considered the FTC's attempt to enforce an order "directing respondents to produce certain documents by way of pretrial discovery" in a pending FTC proceeding. In response to the companies' contention that the FTC could enforce the orders only by commencing a plenary civil action, the court stated:

> As a general rule, district courts do not issue directions in the nature of mandamus except in aid of jurisdiction already acquired. . . .' However, where the Court was able to discover a congressional authorization for use of a writ of mandamus, it approved the issuance upon a petition of a peremptory writ. [citation omitted] By Section 49, [section 9], Congress has expressly conferred jurisdiction to issue a writ of mandamus. Therefore, it seems clear that Congress has expressly authorized the court to proceed summarily to enforce orders of the Federal Trade Commission for the production of documents.

256 F. Supp. at 321. The corporate parties attempt to discount this case (and indeed cite it as the genesis of later courts' confusion) on the ground that, although the court spoke of mandamus, it was really simply a subpoena enforcement action. As such, in the corporate parties' view, it

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Warranty--Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183. Section 204 of the Act amends section 16 of the FTC Act to authorize the Commission to conduct proceedings to enforce subpoenas and section 6 orders. *See* 15 U.S.C. § 56(a)(2)(D). While this shows evidence of Congressional intent to treat the two remedies similarly, it does not answer the corporate parties' Rule 81(b)-Rule 81(a)(3) dichotomy argument.



was subject to the undisputed Rule 81(a)(3) exception, although the court mistakenly cited Rule 81(b). The FTC draws a distinction between a subpoena and an order to produce documents,[8] but fails to explain any essential distinction or significance to any such difference.

Later cases held some light on the issue allegedly confused in *Associated Merchandising*. In *Federal Trade Commission* v. *Sherry*,[9] Judge Robinson of this court, citing *Associated Merchandising* with approval, held that administrative subpoenas are enforceable by way of summary proceeding under the discretionary authority of Rule 81(a)(3). The corporate parties distinguish this case as another subpoena enforcement case. In *Federal Trade Commission* v. *Jorgenson*,[10] Judge Gasch of this court rejected an argument, in the context of an FTC subpoena and order requiring access to particular files, that the FTC could not enforce its subpoena by way of a summary proceeding. The court cited nine cases to support its conclusion that "[a] summary proceeding suffices." Slip opinion, at 2 n. 2. While the corporate parties distinguish this case and all but one of the cases cited therein as subpoena enforcement cases, the court in *Jorgensen* twice referred to the action as involving a subpoena and *order*. Slip opinion, at 1, 1 n. 1. Finally, in *Emerson Electric Co.* v. *Federal Trade Commission*,[11] Judge Pratt of this court considered a claim similar to that made by the corporate parties in this case and rejected it as being "devoid of merit."

In one notable case cited by the parties, this issue was present but, so far as the court can determine, was not

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[8] The FTC likens its procedures to those involved in a Rule 45 subpoena and a Rule 34 order to produce documents.

[9] 1969 Trade Cas. Par. 72,906 (D.D.C. 1969).

[10] Misc. No. 75-46 (D.D.C. May 16, 1975).

[11] Misc. No. 76-0002 (D.D.C. July 21, 1976).

briefed, argued, or considered. In *United States* v. *Litton Industries, Inc.*,[12] the Ninth Circuit considered FTC orders to file special reports and subpoenas duces tecum concerning the effects of corporate mergers. The court suggested that an enforcement proceeding pursuant to section 9 of the FTC Act was proper, without comment on the form that proceeding should take.[13]

The corporate parties' job in attempting to blunt the weight of judicial authority on this question is an unenviable one. They have asked the court to ignore a unanimous string of cases allowing a summary procedure on the grounds that these cases concerned inapposite subpoena enforcement, did not adequately consider the issue, or were just plain wrong. This court does not read these cases as unconvincedly as do the corporate parties. There is no debate that this issue was at least brought to the court's attention in *Jorgenson*, and that the court treated it as a disputed issue. Similarly, the court enforced the FTC's orders in *Associated Merchandising* under the mandamus provisions of section 9 irrespective of whether it was in fact a subpoena that the FTC sought to enforce. That court explicitly considered the relationship between a mandamus under section 9 and Rule 81(b). That conclusion was cited with approval by the court in *Sherry*. *See* 1969 Trade Cas. at 87,455. The same challenge was made by the corporate parties here was considered and rejected by the court in *Emerson Electric*. In all, the court finds a respectable amount of authority for the proposition that the FTC can proceed in mandamus enforcement actions by way of summary proceeding.

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[12] 462 F.2d 14 (9th Cir. 1972).

[13] The FTC suggests that the court infer approval of the practice from the court's silence on the summary proceeding issue, because the question goes to subject matter jurisdiction, into which a court should inquire sua sponte if necessary. However, it is more probable that any courts permitting the practice without comment simply were unaware of the sophisticated argument presented here by the corporate parties.



Moreover, the logic of the corporate parties' Rule 81(b) argument is hardly airtight. The rule merely substituted a motion or action practice for the existing writ practice. The corporate parties candidly admit that before 1946, the date the subpoena exception sentence was added to Rule 81(a)(3), the *Rules* were considered to have only limited application to enforcement proceedings, which were not plenary in nature. 7 J. Moore, *Federal Practice* Par. 81.06[1], at 81-84 (2d ed. 1975). There exists as much a logical basis to assume that Congress, in amending the rule concerning subpoena enforcement, desired to leave existing practice in other enforcement actions unchanged as there is to assume that Congress by its silence meant to subject all enforcement proceedings to the full panoply of *Rules* requirements. Authority exists for the proposition that an action seeking relief in the nature of mandamus may be commenced by motion or petition when there is no pending action. 7 J. Moore, *supra* Par. 81.07, at 81-96 (citing *Associated Merchandising* and *Sherry*). The court on the whole finds the corporate parties' argument ingenious, well-briefed, and well-argued, but nevertheless lacking in merit.

While not impacting on the court's decision on the legal issue, the court also is mindful that, as a practical matter, the debate on this question is a tempest brewed in a rather small teapot. Even if the court accepted the corporate parties contention that the FTC had to commence a normal plenary civil action under the *Rules*, that conclusion simply would force the FTC to file a complaint and begin again. The ensuing delay makes little sense to the court: the FTC has filed a petition instead of a complaint and has proceeded by show cause order rather than summons. The corporate parties point to no prejudice flowing from this procedure and, indeed, appear to recognize that the two have operated in this case as functional if not legal equivalents. In fact, the corporate parties offered to accept the petitions as complaints if the court makes "clear that the filing of a complaint was essential to the Commission's request for re-

lief." Respondents' Reply Memorandum, at 5-6. The court declines, for the reasons stated above, to accept the condition to the corporate parties' concession.[14] But the fact that the corporate parties have offered to proceed despite this alleged defect in the commencement of the actions further demonstrates that they have been denied no procedural rights because of the FTC's course of action.

B. *Compulsory Counterclaims*

The corporate parties' second argument in support of its motion to dismiss is that the FTC must bring any enforcement actions against preenforcement plaintiffs as compulsory counterclaims. Having failed to assert the enforcement actions as counterclaims to the pending preenforcement actions, the court should dismiss them under the authority of Rule 13(a). Rule 13(a) provides, in part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The corporate parties contend that the compulsory counterclaim provisions of Rule 13(a) clearly apply to the instant actions;[15] since the subject matter of the enforcement action without doubt arises out of the same "transaction or

[14] The corporate parties also ask the court to "direct the Commission to file proper pleadings in such matters in the future." Reply, at 6. This, the court would not do in any case, since future cases obviously are not now before the court and the court should not render advisory opinions.

[15] Rule 13(a) applies generally to the United States and its agencies. TOP, Inc. v. Federal Deposit Ins. Corp., 487 F.2d 131 (3d Cir. 1973); 3 J. Moore, *Federal Practice* Par. 13.25 (2d ed. 1975).



occurrence" that forms the basis for the preenforcement actions,[16] Rule 13(a) required assertion of these claims as counterclaims to the preenforcement actions. In addition to the clear requirements of the rule, the corporate parties argue that sound policy considerations support application of the compulsory counterclaim rule in this instance.[17]

The FTC opposes this argument on the ground that, even if Rule 13(a) applies, the time has not yet come for the FTC to file its counterclaims. The FTC has moved to dismiss the preenforcement actions, and this court has not yet ruled on this motion. Under paragraph 10 of this court's July 30, 1976 order, answers are not due until 30 days after notice of the court's denial of the motions to dismiss. Thus the FTC is not yet required to file its answers, much less its counterclaims. The corporate parties seek to avoid this contention on two grounds. First, they argue that the Commission cannot raise this challenge again because the motion to dismiss already has been adversely determined to the FTC by the Delaware district court and the Third Circuit, and that decision has become the law of the case for this court. This argument plainly is without merit; not only may circumstances have changed since those opinions were written, but also they concerned the 1973 LB orders and not the 1974 orders here at issue. Second, the corporate parties contend that the duty to assert a compulsory counterclaim is only postponed by a motion to dismiss, and continues unless the motion is granted. A claim becomes non-

[16] A number of tests have been used to determine the same "transaction or occurrence" test. *See* Pipeliners Local 798 v. Ellerd, 503 F.2d 1193, 1198 (10th Cir. 1974); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1410, at 42 (1971).

[17] The corporate parties quote a passage from *Columbia Plaza Corp.* v. *Security Nat'l Bank*, 525 F.2d 620, 626 (D.C. Cir. 1975), relating to the conservation of judicial resources under Rule 13(a) by eliminating duplicate proceedings. Since the enforcement and preenforcement cases have been consolidated in this court, however, judicial economy problems have been minimized.

compulsory only if it was the subject of another pending action at the time the action was commenced. Rule 13(a). This argument does no more than suggest that the counterclaims may be due at some time in the future; in the interim, the corporate parties expect the FTC to postpone its separate enforcement actions if it desires to move to dismiss the preenforcements actions. The court does not accept this contention.

The court identifies additional reasons to view the corporate parties' claims with some hesitancy. They can cite no cases in which a court has treated an enforcement action as a compulsory counterclaim, while the FTC cites two in which the argument was rejected. *A.O. Smith Corp.* v. *Federal Trade Commission*, 417 F. Supp. 1068, 1088-89 (D. Del. 1976); *Federal Trade Commission* v. *Emerson Elec. Co.*, Misc. No. 76-0002 (D.D.C. July 21, 1976). The FTC's enforcement actions involve assertion of rights under a Congressionally mandated enforcement scheme, thus distinguishing the case from the *Columbia Plaza* case relied on by the corporate parties. *See A.O. Smith Corp.*, *supra*. Acceptance of the corporate parties' argument would mean that companies seeking to resist FTC orders might well be able to choose the forum and pace of the litigation simply by bringing preenforcement actions. These preenforcement actions could, as here, be brought in more than one forum. The implications of the corporate parties' contentions might work more to encourage than discourage duplicative litigation, and thus ultimately result in impeding the policy objectives of Rule 13(a).[18] The conse-

[18] The corporate parties suggest that duplicative litigation could be avoided by normal procedures: motions for change of venue and coordination under the guidelines of the Judicial Panel on Multi-District Litigation. This argument does not meet, however, the FTC's concern at being forced to raise or lose its enforcement claims at the times and places dictated by companies' preenforcement actions. At best, this relief would come at a later time, after the FTC would have been forced to submit to the companies' timing for asserting enforcement claims.



quences of a ruling in the corporate parties' favor could be undesirable and unwarranted.

### C. *Personal Jurisdiction*

A total of eight of the corporate parties assert a lack of personal jurisdiction over them. This claim encompasses two primary contentions: (1) that no summons and complaint were issued, an indispensable prerequisite to a court's assertion of jurisdiction over a party in a civil action; and (2) these corporate parties were served beyond the confines of the District of Columbia despite lack of statutory sanction for such service. The first argument can be handled quite easily, as it amounts to a continuation of the claim that the FTC cannot bring its enforcement actions by petition and show cause order. The court has rejected this argument. *See* § 1(A), *supra*. The corporate parties certainly have received the notice a summons is designed to provide under the petition-show cause order procedure.

A more difficult issue is posed by the corporate parties' second argument. The FTC effected service in these enforcement actions by two methods: personal service by a United States Marshal outside of the District of Columbia and service on the D.C. Recorder of Deeds to be mailed to the named respondents. Rule 4(f) of the *Federal Rules of Civil Procedure* provides that service of process may occur beyond the territorial limits of a state "when authorized by a statute of the United States or by these rules. . . ." Rule 4(e) authorizes extraterritorial service where "a statute or rule of court of the state in which the district court it held" so provides. The FTC does not argue that a federal statute permits extraterritorial service in the circumstances of this case; the court therefore will focus on state statutes purporting to allow such service here.

The parties agree that the potentially applicable statutes are 13 D.C. Code § 334 and 29 D.C. Code § 933i. The parties further agree that the relevant portions of these two stat-

utes require that a corporation be "doing business" in the District of Columbia before it is amenable to service.[19] The parties, unsurprisingly, have differing interpretations of what constitutes doing business, however.

The corporate parties argue that the FTC must show that each moving company has "fairly extensive" contacts with D.C. in order to sustain jurisdiction for a cause of action not arising out of the company's activity in D.C. A somewhat higher standard should exist for such an unconnected cause of action than for one arising directly from the company's contacts with the forum district.[20] The corporate parties go on to contend that the companies must maintain a permanent office in D.C. in order to be subject to service. Corporate Parties' Memorandum, at 50 n. 76. The court finds this argument to be without merit; foreign corporations often have been found to be doing business in D.C. despite the lack of a permanent office. *E.g., Washington* v. *Hospital Service Plan,* 345 F.2d 105 (D.C. Cir. 1965); *Frene* v. *Louisville Cement Co.,* 134 F.2d 511 (D.C. Cir. 1943); *Stevens* v. *American Service Mutual Ins. Co.,* 234 A.2d 305 (D.C. Ct. App. 1967); *Key* v. *S.C. Johnson & Son, Inc.,* 189 A.2d 361 (D.C. Ct. App. 1963). The corporate parties also contend that many of the contacts the moving parties might have with the District are maintained for the purpose of interacting with the federal government. They claim the "government contacts" principle protects them

[19] See Payton v. Summit Loans, Inc., 253 A.2d 459, 460 n. 1 (D.C. Ct. App. 1969).

[20] While the parties cite no cases explicitly drawing the distinction, it appears implicit in several of the leading cases. *See* Washington v. Hospital Service Plan, 345 F.2d 105 (D.C. Cir. 1965); Byrd v. Norfolk & Western Ry., 194 A.2d 651 (D.C. Ct. App. 1963); Key v. S. C. Johnson & Son, Inc., 189 A.2d 361 (D.C. Ct. App. 1963). *See generally* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121, 1179 (1966).



from the court's consideration of these activities in determining amenability to service.[21]

The FTC contends that the court should address the business purpose being served by the moving parties' presence in D.C. It suggests that the marketing or products in the District, through either solicitation of sales or shipment or products, can constitute doing business. *See Frene* v. *Louisville Cement Co.,* 134 F.2d 511 (D.C. Cir. 1943); *Key* v. *S.C. Johnson & Son, Inc.,* 189 A.2d 361 (D.C. Ct. App. 1963). Advertising within the District can be considered as a factor. *Payton* v. *Summit Loans, Inc.,* 253 A.2d 459 (D.C. Ct. App. 1969). The FTC distinguishes two cases relied on by the moving corporate parties[22] as hinging on the *plaintiffs'* complete lack of contacts with the forum state in those cases.[23] Here, it notes that the FTC has obvious contacts with the District.[24]

The court is faced with a somewhat difficult task in attempting to sort out the various claims of the parties. It appears that solicitation of sales or shipment of goods potentially can qualitfy as doing business. The necessary showing should be at least somewhat higher for an uncon-

[21] The government contacts exception had its genesis in *Mueller Brass Co.* v. *Alexander Milburn Co.,* 152 F.2d 142 (D.C. Cir. 1945), and its latest expression in *Environmental Research International, Inc.* v. *Lockwood Greene Engineers, Inc.,* 355 A.2d 808, 813-14 (D.C. Ct. App. 1976).

[22] Ratliff v. Cooper Labs., Inc., 444 F.2d 715 (4th Cir.), *cert. denied,* 404 U.S. 948 (1971); Seymour v. Parke Davis Co., 423 F.2d 584 (1st Cir. 1970).

[23] *See* 423 F.2d at 587; Lee v. Walworth Value Co., 482 F.2d 297 (4th Cir. 1973) (distinguishing *Ratliff* on ground of plaintiffs' lack of contact with forum district).

[24] *But see* Environmental Research Int'l, Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 812 (D.C. Ct. App. 1976) (plaintiff's activities in forum district cannot establish requisite contacts for personal jurisdiction.

nected cause of action than for a cause of action arising directly out of a defendant's activities in the forum district. The government contacts exception potentially applies, depending on the purposes and functions served by those contacts. Within this framework the court can examine the situations of the moving companies to resolve what is essentially a factual question about sufficiency of the contacts of each company.

The moving corporate parties have submitted affidavits concerning the extent of their contacts with the District of Columbia. On the basis of these, they ask the court to conclude that no basis for personal jurisdiction over them exists. The court finds these affidavits insufficient. Some neglect to identify the dollar value of goods shipped to the District, some fail to state whether D.C. shipments are a substantial contribution to total sales, some are vague on the question of distributors, detail men, or salesmen and where they are located, and some fail to state conclusively whether any goods are sold in the District at all. From the information now before the court by way of these affidavits, the court preliminarily believes that at least some of these companies have sufficient contacts with the District to qualify as transacting business under 29 D.C. Code § 933i(c). The court nevertheless feels that additional discovery would be quite helpful to the court in making these determinations, and it is advised that the FTC has propounded certain interrogatories that could help to resolve this question.[25] The court therefore will permit this additional discovery and defer decision on this aspect of the corporate parties' motion to dismiss.

With respect to one moving party, Fairmont Foods, there is no need to defer decision. Fairmont admits that it is

[25] The corporate parties have moved for a protective order as to these interrogatories on the general grounds advanced in their arguments on this question. The court will deny that motion for the same reasons it cannot grant their motion to dismiss at this time.



authorized to do business in the District, has appointed a registered agent, and received service of process through that registered agent. This service is sufficient to bring Fairmont before the court. 29 D.C. Code § 933i(a). Fairmont contends, however, that section 933i(a) relates solely to manner of service, not amenability to service. In support of the proposition, Fairmont relies on one D.C. case[26] which held that the absence of a license to do business does not mean that a company is not in fact doing business, and on one Fourth Circuit case[27] not purporting to apply any laws of the District. The court does not find these compelling precedents for Fairmont's position. The language of section 933i(a) tracks closely that of section 933i(c), but no claim has been made that section 933i(c) does not relate to amenability to service. Accordingly, Fairmont's motion to dismiss on this ground will be denied.

## II. FTC's Motion To Dismiss

The FTC parties move to dismiss the preenforcement actions concerning the LB and CPR programs. The court has identified four basic arguments advanced by the FTC in favor of this motion: (1) judicial review of the FTC's exercise of its powers of compulsory process is unavailable by way of preenforcement action where no notice of default has been issued; (2) even if judicial review potentially is available, the corporate parties have failed to meet the standards of the *Abbott Labs* trilogy; (3) the FTC itself must be dismissed because it has not waived sovereign immunity in this instance; and (4) sound reasons exist for the court to dismiss the preenforcement actions as a matter of discretion. For the reasons stated below, the court rejects the first three arguments and wishes to defer a decision on discretionary dismissal.

[26] Kelberine v. Societe Internationale, Etc., 363 F.2d 989, 993 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 989 (1966).

[27] Ratliff v. Cooper Labs, Inc., 444 F.2d 745, 748 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971).

### A. *Availability of Preenforcement Review*

The FTC contends that judicial review of the validity of the Commission's exercise of its powers of compulsory process can be had only in an enforcement proceeding brought under section 9 or 10 of the FTC Act where no notice of default has been issued. *See St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 226 (1961); *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 174 (1927). The court will not deal extensively with this argument, as it was persuasively rejected by the Third Circuit in *A.O. Smith* v. *Federal Trade Commission.*[28] This court fully concurs with the reasoning of that decision on this issue. *St. Regis* and *Claire Furnace* must be considered in the context of the more recent Supreme Court decisions in the *Abbott Labs* trilogy.[29] As the Third Circuit noted:

> The fundamental jural lesson flowing from *Abbott Laboratories* is this: a person aggrieved by final agency action may come to federal court for judicial review "so long as [a] no statute precludes such relief or [b] the action is not one committed by law to agency discretion." • • • We have examined the FTC Act and find no clear and convincing evidence of a congressional intent to bar judicial review of final FTC orders under Section 6(b).

530 F.2d at 521. For these reasons the court concludes that preenforcement review potentially is available to the corporate parties in this situation.

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[28] 530 F.2d 515, 519-21 (3d Cir. 1976).

[29] Abbott Labs v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967).

[30] It is not entirely clear to the court whether the FTC makes this as a separate legal argument or as an adjunct to its argument on discretionary dismissal. The court will deal with it as a separate legal argument and in connection with discretionaray dismissal.



### B. *Application of* Abbott Labs

The FTC also appears to argue that, even if judicial review potentially is available, the corporate parties no longer, if they ever did, meet the standards set forth in the *Abbott Labs* trilogy for a court's exercise of preenforcement jurisdiction.[30] Justice Harlan focused on two questions in *Abbott Labs*: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. 387 U.S. at 148-49. The FTC notes that the hardship to the parties in awaiting judicial determination of their claims in an enforcement proceeding now is minimal. Since no notice of default has been issued, the corporate parties face no civil or criminal penalties for noncompliance. Indeed, the corporate parties no longer are on the horns of a dilemma in attempting to decide whether to comply or face stiff penalties; the risks of noncompliance are ephemeral.[31]

The problem with this approach is that *Abbott Labs* essentially involves a ripeness inquiry. *See* 387 U.S. at 148-49. There no longer exists serious doubt as to whether these preenforcement actions are ripe in the *Abbott Labs* sense. Enforcement actions have been commenced; the issues have been concretely framed. This court's subject matter jurisdiction is established by 28 U.S.C. §§ 1331, 1337. For these reasons there is no point in the court reconsidering the hardship issue under the *Abbott Labs* analysis, and no reason to dismiss on this ground.

### C. *Sovereign Immunity*

The FTC has moved to dismiss itself as a defendant in the preenforcement actions on the ground that sovereign immunity bars a suit against a federal agency *eo nomine* unless Congress has granted such a right against the

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[31] *See* A.O. Smith v. FTC, 417 F. Supp. 1068, 1082-85 (D.Del. 1976).

agency. The FTC claims that here no such authorization has occurred. While the FTC may be correct in its statement of the law,[32] it is incorrect in asserting that no Congressional authorization for such a suit exists. In *Scanwell Laboratories, Inc.* v. *Shaffer*,[33] the District of Columbia Circuit held that the judicial review provisions of the Administrative Procedure Act serve to waive sovereign immunity:

> It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory.[34]

While the APA should not be interpreted to constitute a waiver of sovereign immunity in suits seeking money damages against the United States,[35] in the context of this case the court is convinced that the judicial review provisions of the APA have waived the FTC's sovereign immunity claim, and the court accordingly rejects that argument.

### D. *Discretionary Dismissal*

Finally, the FTC suggests that the court should exercise its discretion to dismiss the preenforcement actions. It asserts that the pending enforcement actions present a

[32] *E.g., Economou* v. *Department of Agriculture*, 535 F.2d 688, 690 (2d Cir. 1976); *Midwest Growers Coop. Corp.* v. *Kirkemo*, 533 F.2d 455, 465 (9th Cir. 1976).

[33] 424 F.2d 859 (D.C. Cir. 1970).

[34] *Id.* at 874.

[35] *See* Scanwell Labs. Inc. v. Thomas, 521 F.2d 941, 948 (D.C. Cir. 1975).

[36] *See* Emerson Elec. Co. v. FTC, Civ. No. 74-746 (D.D.C. July 21, 1976) (Pratt, J.) (preenforcement claims may be raised as defenses in enforcement proceeding.



wholly adequate forum for the corporate parties to raise any defenses and claims they might have concerning the LB and CPR programs.[36] It views the preenforcement actions as unnecessary baggage for the court to carry in light of the statutory enforcement actions. The FTC assures the court that no prejudice to the corporate parties will flow from a dismissal.[37]

The corporate parties oppose on several grounds. First, since all the enforcement and preenforcement actions have now been consolidated before this court, no risk of duplicative judicial efforts exist. Second, they prefer consideration of the issues raised by the LB and CPR programs within the context of a normal civil action, in which no doubts exist as to discovery or judicial review. Finally, the corporate parties suggest that there simply is no need to dismiss at this point of the proceedings, and that the court should avoid needless rulings.

In light of the fact that both the preenforcement and enforcement actions have been consolidatd, and in light of the fact that counsel for the FTC stated in oral argument that the Commission does not seek an immediate decision on this motion, the court will defer consideration of the motion to dismiss.[38] At a later time the court may be in a better position to determine this issue, and later rulings

[37] The court tends to agree with the FTC on this point. Discovery would be narrowly circumscribed in either action, so the corporate parties would lose nothing by way of discovery. The other identified concern of the corporate parties—the scope of the court's review of the programs—promises to be an important issue regardless of in which action the court considers it.

[38] The court need not defer consideration of whether to dismiss preenforcement claims relating solely to the 1973 LB orders. As Judge Schwartz noted, those claims are moot. A.O. Smith v. FTC, 417 F. Supp. 1068, 1074 (D. Del. 1976). This conclusion does not affect claims challenging the 1974 LB orders that relate to the development and implementation of the entire LB program, however.

by this court on other issues may render the court's task simple indeed. By deferring consideration of this motion, the court will be able to consider both summary judgment motions pending in these actions—and all arguments on the merits contained therein.

Thus the court will deny the FTC's motion to dismiss on the three legal grounds asserted and defer consideration of a discretionary dismissal.

### III. Comptroller General's Motion to Dismiss

The Comptroller General moves to dismiss the preenforcement actions on the ground that the actions of the Comptroller General pursuant to the Federal Reports Act, 44 U.S.C. § 3512, are not judicially reviewable.[39] The Comptroller General presents two primary arguments in support of that conclusion: (1) Congress intended to preclude judicial review of the Comptroller's decisions under the Act; and (2) the corporate party plaintiffs have an adequate alternative remedy in court. Because the court rejects both these arguments for the reasons stated below, the Comptroller's motion to dismiss will be denied.

#### A. *Congressional Intent to Preclude Review*

The Comptroller notes that the corporate parties claim a right to judicial review of the LB and CPR program orders under the applicable provisions of the Administrative Procedure Act. 5 U.S.C. § 701-06. He contends that the legislative history of the Federal Reports Act demonstrates a Congressional intent that judicial review of his actions under the statute be precluded.[40] The Comptroller bases

[39] The Comptroller has moved in the alternative for summary judgment, but the court prefers to consider the other issues raised by the Comptroller at the same time as it considers the other pending summary judgment motions in these actions.

[40] The APA review provisions do not apply to the extent that "statutes preclude judicial review." 5 U.S.C. § 701(a)(1).



his conclusion that Congress took the unusual step of precluding judicial review on two major grounds. First, he notes that the purpose of the Act was to prevent the "delay and obstruction" that occurred when the Office of Management and Budget, advised by the industry-oriented Business Advisory Council, held the clearance function for independent regulatory agencies' special reports. Congress transferred this clearance power to the General Accounting Office to prevent the undue impairment of independent regulatory agencies' data collection efforts. Although the Comptroller correctly discerns the motivation stirring Congress to passage of this statute [41] he fails to draw a viable link between this policy goal and a statutory preclusion of judicial review. Second, the Comptroller argues that since the GAO has only 45 days in which to perform the review function, after which the agency may proceed,[42] the conclusion that Congress intended to preclude judicial review is further enhanced.

The Comptroller admits, however, as he must, that there exists a presumption in favor of judicial review. This strong presumption can be overcome only "upon a showing of 'clear and convincing evidence' of a contrary legislative intent. . . ." [43] The Comptroller has failed to meet this heavy burden in this instance. At best, a court could indirectly imply from Congress' obvious desire to prevent undue delays an intent to protect the Comptroller's actions from judicial scrutiny. This tenuous link, however, does not constitute clear and convincing evidence of Congressional intent to preclude judicial review; Congress was silent on the matter, and the presumption of reviewability must apply.

[41] *See* H.R. Rep. No. 624, 93d Cong., 1st Sess. 31 (1973) (Conference Report).

[42] 44 U.S.C. § 3512(d).

[43] Dunlop v. Bachowski, 421 U.S. 560, 567 (1975), *quoting* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967).

### B. *Adequate Alternative Remedy*

The Comptroller also contends that the corporate parties have an adequate alternative remedy in court against the FTC. Agency action is made reviewable under the APA when "there is no other adequate remedy in a court. . . ." [44] This argument relies on the Comptroller's conception of the goals the corporate parties seek in pursuing this litigation. Since the corporate parties seek to prevent implementation of the LB and CPR programs and raise many of the same issues against the FTC that they raise against the GAO, the Comptroller reasons that a remedy against the FTC would be sufficient. He suggests that the ultimate relief sought by the corporate parties, a prohibition on the use of the LB and CPR forms, can be obtained from the FTC alone.

The court is not much impressed by this argument. The Comptroller makes no claim that there is another adequate proceeding in court by which the corporate parties can obtain direct review of the Comptroller's actions. Only indirectly could the corporate parties challenge the actions of the Comptroller if he is dismissed from the preenforcement actions. Nothing in the APA precludes review of the actions of two agencies that acted in concert merely because relief may be available against one of them.[45] Additionally, it makes sense for the court to have before it the agency whose actions are challenged so that its views may be fully presented.[46] Moreover, relief against the FTC certainly

[44] 5 U.S.C. § 704.

[45] The Comptroller claims, however, that section 704 requires only an adequate alternative remedy, not necessarily an adequate alternative remedy against the same party. He cites for this proposition no cases dealing directly with this question, though, and the court feels that the adequacy of the alternative remedy necessarily is partly determined by whether it can be obtained against the same party.

[46] *Cf.* Air Products & Chemicals, Inc. v. United Gas Pipe Line Co., 503 F.2d 1060, 1062 (Temp. Emer. Ct. App. 1974).



does not necessarily mean relief against the Comptroller General; for example, if the court should decide that the corporate parties should prevail on an issue unrelated to the Federal Reports Act, when the court would need make no determination on the question of the Comptroller's actions. In all, the Comptroller has not presented a convincing case for dismissal on the ground that an adequate alternative remedy in court exists.

## IV. FTC's Motion for More Definite Statement of Counterclaims

The FTC moves the court to require a more definite statement of the counterclaims asserted by the corporate parties in the enforcement actions. The corporate parties, in their answer to the Commission's enforcement position, have incorporated as counterclaims all claims asserted by all parties in the preenforcement actions.[47] The FTC objects to this shotgun approach [48] to pleading counterclaims on several grounds, and desires a more definite statement before framing a responsive pleading.

First, the FTC argues that it is unclear whether the corporate parties intend to do more than assert affirmatively their claims concerning the validity of the actions taken by the FTC and the GAO. If not, the Commission reasons, these are simply improperly denominated defenses and require no reply; if so, the FTC will have to respond. There is little doubt in the court's mind that the corporate parties' counterclaims seek affirmative relief against the FTC and GAO in the form of declaratory judgments and permanent injunctions.

[47] Preenforcement plaintiffs incorporate all claims they have asserted while respondents not involved in the preenforcement cases incorporate all claims of all preenforcement complaints.

[48] The FTC asserts that there are 44 preenforcement actions and 30 intervention complaints in the LB litigation, and 23 preenforcement actions and 24 intervention complaints in the CPR litigation.

Second, the FTC contends that the counterclaims resurrect dead issues, insofar as they seek to assert claims not addressed by the corporate parties in their pleadings before this court. Although the FTC believes that claims not raised in the partial summary judgment motion or discovery outline have been waived, the court has decided to the contrary. Order of November 4, 1976.

Finally, the FTC argues that the counterclaims are vague and ambiguous. Many of the corporate parties were not involved in the preenforcement actions, and wide differences in those complaints exist. Many could not have joined in all the claims because of factual differences, failure to exhaust administrative remedies, and other reasons. The FTC's objection to the validity of the counterclaims, however, should not be an important factor in a motion for a more definite statement. If some parties cannot sustain certain claims for the reasons mentioned by the Commission, those arguments can be raised by the FTC in its responsive pleading.

The court is of the opinion, however, that in some respects the counterclaims fail as "short and plain statement[s]" of the claims asserted.[49] Where such a large number of preenforcement complaints and motions to intervene have been filed, at the least the corporate parties should present a single list of all the claims they wish to assert as counterclaims, rather than put the burden of finding and answering each of the preenforcement complaints on the Commission. The court would itself prefer to work with a single listing of all counterclaims. The court hopes that the corporate parties will exercise judgment in compiling this single list, so that identical claims are consolidated and obviously unmeritorious or moot claims (such as those concerning only the 1973 LB orders) are eliminated.

/s/ Thomas A. Flannery
United States District Judge

Dated: January 21, 1977

[49] F.R. Civ. P. 8(a).



(Caption Omitted in Printing)

(Filed January 31, 1977)

**Order**

In accordance with the attached Memorandum Opinion, it is, by this court, this 21st day of January, 1977,

Ordered that the corporate parties' motion to dismiss the enforcement actions be, and the same hereby is, denied, except as to the corporate parties challenging personal jurisdiction (besides Fairmont Foods), as to whom the court defers decision on the motion to dismiss; and it is further

Ordered that the motion for a protective order submitted by the corporate parties challenging personal jurisdiction be, and the same hereby is, denied; and it is further

Ordered that the FTC's motion to dismiss the preenforcement actions be, and the same hereby is, denied as to all grounds supporting it other than discretionary dismissal, and as to the discretionary dismissal issue the court defers decision; and it is further

Ordered that the Comptroller General's motion to dismiss be, and the same hereby is, denied; and it is further

Ordered that the FTC's motion for a more definite statement of counterclaims be, and the same hereby is, granted to the extent that the corporate parties shall submit a master list of all claims asserted by way of counterclaims in the enforcement actions no later than February 4th, 1977.

/s/ Thomas A. Flannery
United States District Judge

(Caption Omitted in Printing)

(Filed April 12, 1977)

**Memorandum Opinion**

The court presently has before it consolidated pre-enforcement and enforcement actions concerning the Federal Trade Commission's orders directing numerous companies to file certain special reports. At issue are the FTC's information-gathering activities with respect to the 1974 Line of Business (LB) report and the Corporate Patterns Report (CPR) survey. The court already has considered various motions to dismiss. Order of Jan. 31, 1977. The FTC and the Comptroller General have moved for summary judgment at this time, while the corporate parties seek partial summary judgment. Oral hearings on these motions were held February 11 and 25, 1977, and the motions are ripe for consideration and decision at this time.

The corporate parties challenge the enforcement of the FTC's orders to file the LB and CPR forms on a number of grounds. The court will consider each of these claims in turn. An appropriate order accompanies this memorandum opinion.

## I. Statutory Authority

The corporate parties contend that the FTC lacks the statutory authority to implement the LB and CPR programs. This claim centers on an interpretation of section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46.[1]

[1] Section 6 provides, in relevant part:

The Commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

(b) To require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.



While the corporate parties admit that section 6 relates to the general power of the Commission to conduct investigations, require special or annual reports, and publish the results of its investigations, they argue that section 6 is not an unfettered grant of authority to conduct any type of investigation or information-gathering project. To the corporate parties, section 6 grants the authority to investigate, so long as the investigation is related to the FTC's enforcement authority, but does not grant the power to conduct statistical reporting programs. In support of this proposition, the corporate parties offer an imaginative interpretation of the legislative history of the Act and relevant judicial decisions.

The linchpin of the corporate parties' argument is that the LB and CPR programs are not focused investigations. If not investigations, they contend, then the section 6(b) special report orders do not relate to the Commission's section 6 (a) power of investigation and do not relate to the Commission's quasi-judicial powers under section 5 of the Act. Since the FTC admits that the LB and CPR

programs are broad-based and not aimed simply at suspected violators, the corporate parties reason that they cannot qualify as legitimate investigations. Instead, these statistical reporting programs are more in the nature of a fishing expedition; the corporate parties charge that without a direct link to the Commission's substantive responsibilities these section 6(b) orders could intrude indiscriminately into the private domain.

The corporate parties suggest that the legislative history of the FTC Act supports the view that section 6 was intended only as an aid to section 5 powers. Without exhaustively repeating the arguments of both the corporate parties and the FTC on this question, the court can reject the corporate parties' claim to the extent that it suggests the FTC was intended to be only a quasi-judicial agency with information-gathering powers narrowly limited to its quasi-judicial functions.[2] The corporate parties bottom their argument on a statement by Senator Newlands, made after the enactment of the Act, that the FTC's exercise of its investigatory powers would be limited to those suspected of violating the law.[3] Apart from the problem of personal, post-hoc explanations as legislative history, a fair reading of the legislative history does not support that view.[4] First, the FTC was intended to assume, *inter alia*, the powers formerly held by the Bureau of Corporations, a research and investigatory agency with no law enforcement powers. H.R. Rep. No. 1142, 63d Cong., 2d Sess. 18 (1914) (conference report).

[2] This argument is based, in part, on the claim of ascendancy of the Senate bill over the House bill in the final enactment of the Act.

[3] Newlands, *The Federal Trade Commission Bill*, Am. Rev. of Reviews 477, 479-80 (Oct. 1974). Senator Newlands also made a similar statement on the floor, but there is a question whether he later retracted that statement. 51 Cong. Rec. 11110 (1914).

[4] *See generally* Handler, *Constitutionality of Investigations by the Federal Trade Commission*, 28 Colum. L. Rev. 708 (1928).



Second, while the conferees did indeed rely largely on the Senate bill, they exhibited no intent to cut down the broader powers present in the House bill.[5] Finally, statements made by Senator Newlands himself suggest that the FTC would have vast discretion in determining its special reports needs.[6] In short, the legislative history does not support the corporate parties' claims.

The corporate parties next rely on their interpretation of several cases. The corporate parties attempt to distinguish the most important of these cases, *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), on the ground that *Morton Salt* decided only the question of whether a section 6 special report order could be used in aid of the Commission's section 5 quasi-judicial powers; it did not decide whether a section 6 order can fly "solo." Indeed, the corporate parties correctly state the holding of that case.[7] Yet the proper inference to be drawn from *Morton Salt*, in this court's opinion, is that section 6 orders can be used *both* in aid of section 5 responsibilities and in support of general economic reports. The Court rejected an argument made there that section 6 reports "can be required only 'in support of general economic surveys and not in aid of enforcement proceedings under Section 5.'"[8] The Court characterized the special report provision as enabling the Commission to elicit "any information" beyond the normal data of an annual report.[9] The corporate parties also cite *FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924). There the Supreme Court rejected the FTC's claim that sections 5 and 6 permitted the Commission an unlimited right of access to the to-

[5] *Id.* at 732.

[6] *E.g.*, 51 Cong. Rec. 11182 (1914).

[7] 338 U.S. at 649.

[8] *Id.* at 649.

[9] *Id.* at 650.

bacco companies' papers and files.[10] Not even the corporate parties claim this early case to be directly applicable to the present circumstances, however; the FTC here does not seek unlimited access. Two lower court rulings also bear on the issue, in the corporate parties' minds. *FTC* v. *Claire Furnace Co.*, 385 F. 936 (D.C. Cir. 1923), *rev'd* 274 U.S. 160 (1927); *United States* v. *St. Regis Paper Co.*, 181 F. Supp. 862 (S.D.N.Y.), *aff'd in part & rev'd in part*, 285 F.2d 607 (2d Cir. 1960), *aff'd*, 368 U.S. 208 (1961). Yet the D.C. Circuit in *Claire Furnace* considered the question of the FTC's power to investigate in the context of whether "interstate commerce" was shown, and did not consider the issue presented here. The district court in *St. Regis* did comment on the scope of section 6(b) orders with respect to material not kept in the regular course of business, but its conclusion was endorsed neither by the Second Circuit nor by the Supreme Court. Thus the case relied on by the corporate parties present far from a compelling argument for lack of statutory authority.

Having found the corporate parties' interpretation of the legislative history and caselaw unconvincing, the court additionally finds the plain wording of section 6(b) to sustain the statutory authority of the Commission to act with respect to LB and CPR. That section permits the Commission to "require, by general or special orders, . . . [companies] to file with the Commission in such form as the Commission may prescribe annual or special . . . reports. . . ." 15 U.S.C. § 46(b). This express authorization certainly appears to include the special reports sought in the LB and CPR orders. On the basis of this clear wording, Judge Schwartz found no probable merit to the corporate parties' similar claim for the 1973 LB orders.[11] While some limit may exist to the FTC's power

[10] 264 U.S. at 305-07.

[11] A. O. Smith Corp. v. FTC, 396 F. Supp. 1108, 1120-21 (D. Del. 1975), *rev'd on other grounds*, 530 F.2d 515 (3d Cir. 1976).



to require special reports under section 6(b), that issue does not really arise where, as here, even the corporate parties admit that the programs are at least indirectly connected to the Commission's law enforcement efforts.[12] Nothing in the statute, legislative history, or caselaw supports the corporate parties' alternative claim that section 6 authority may be exercised only in contemplation of specific law enforcement activity.[13] The court thus concludes that the FTC acted within its statutory authority in implementing the LB and CPR special reports program.

## II. Rulemaking Under the APA

The corporate parties claim that the LB and CPR programs constitute rulemaking within the meaning of the Administrative Procedure Act (APA) and that the FTC violated the applicable APA provisions concerning rulemaking. This claim presents two separate issues: whether the programs constitute rulemaking, and, if so, whether the FTC complied with the APA rulemaking requirements.

The APA defines a "rule" as

> the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, cor-

[12] The Commission states its hope to use LB data to focus its law enforcement efforts more effectively, and to use CPR data to provide a data base to be used by the FTC in formulating overall enforcement policy and in investigating and proceeding against particular law violations.

[13] This argument derives, no doubt, from the corporate parties' belief that the LB and CPR programs are merely statistical reporting programs, not focused on ascertainment of possible violations of law. This view is not wholly justified. *See* note 12 *supra*.

> porate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of any valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4). Rulemaking is defined as "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5). The corporate parties contend that the LB and CPR programs [14] fall within this statutory definition and thus qualify as rulemaking. The APA identifies several components of a rule: it must be of "general or particular applicability;" it must be of "future effect;" and it must be designed to "implement, interpret, or prescribe law or policy." The court first will consider whether the LB and CPR programs implement or prescribe law or policy.

The corporate parties contend that the LB and CPR programs implement or prescribe law or policy in two ways. First, as Judge Schwartz found with respect to the 1973 LB orders in granting a preliminary injunction to the corporate parties, the "far-reaching directives . . . effectively prescribe the manner in which business records are to be kept for reporting purposes. . . ." *A.O. Smith Corp.* v. *FTC,* 396 F. Supp. 1108, 1123 (D. Del. 1975), *rev'd on other grounds,* 530 F.2d 515 (3d Cir. 1976). Indeed, if the FTC has prescribed accounting methods, it has engaged in rulemaking since the definition of a rule "includes the approval or prescription for the future of . . . valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). The corporate parties suggest that the data sought by the Commission is not available from the books and records of most firms; the internal organization of most businesses does not correspond to the uniform category system envisioned by the LB reports. The court cannot agree that the 1974 LB orders, the CPR orders, or the programs have effectively prescribed accounting methods or practices with respect to business records maintained for reporting purposes. Certainly the FTC has not actually prescribed new accounting methods. Rather, the corporate parties' argument reduces to the contention that the required certification of accuracy forces them to revise their systems of accounts to prevent false certification. It is clear, however, that the programs do not require any company to alter present recordkeeping practices; the Commission in no way prescribes accounting methods, although certain companies may wish voluntarily to alter their procedures. In addition, the FTC has made it clear that certain estimates are permitted on the forms, and this certainly mitigates the stringency of the accuracy certification. Moreover, the corporate parties can hardly claim that the present orders have prescribed accounting methods, since the present orders seek data from years past; the corporate parties in effect argue that they may change accounting practices if these programs are continued in subsequent years. For these reasons the court concludes that the LB and CPR programs do not implement or prescribe law or policy by effectively requiring certain accounting practices.[15]

The corporate parties alternatively claim that the programs implement law or policy in their effect on FTC

[14] The corporate parties have not been entirely clear about which aspects of the two programs they consider to be "agency statement" under the APA. In their papers, the corporate parties appear to characterize the whole programs as the "statement". At oral hearing on this question, counsel for the corporate parties defined the relevant "statement" as "all of the FTC's minutes, resolutions, and statements, which in combination" reflect the two programs.

[15] The corporate parties also argue that the programs constitute rulemaking because the FTC will prescribe valuations and costs for the LB program. To the extent such valuations or costs will be prescribed by the FTC staff, they will be for internal purposes and will not impose obligations on the companies. Thus such valuations do not meet the definition of a rule under 5 U.S.C § 551(4).

antitrust enforcement goals and, if the data is published, on private investment decisions.[16] The corporate parties have failed to specify concretely how the possible, or even planned, future use of the data generated by LB and CPR give those programs sufficient regulatory impact for the court to conclude that the programs themselves implement law or policy. The corporate parties seek to ascribe to the special reports programs a "regulatory purpose" merely on the basis of the possible future use to which the data might be put. This argument goes too far. If data collected for possible future use by the Commission in implementing its law or policy can itself be considered to implement law or policy, then all types of agency activity, including agency subpoenas, similarly could qualify as rulemaking. The data collection effort does not itself implement law or policy, although the later regulatory steps the Commission might choose to take in partial reliance on the data submitted could do so. The programs cannot fairly be construed as "regulating" the FTC's resource allocation decisions, nor can they be viewed simplistically as vehicles to implement the Commission's section 6(f) publication power. In sum, the

[16] The corporate parties have described this claim variously during the pendency of this action. In their LB partial summary judgment motion, the corporate parties focused on the "regulatory resource allocation purposes", asserting that the programs seek to regulate the Commission's own resource allocation and, through publication, investment decisionmaking. This the corporate parties term "regulation through publicity." In their reply to their motion the corporate parties stressed private sector reallocation of resources by investment decisions and the Commission's design to restructure industries singled out by the data for antitrust enforcement. At oral hearing, counsel for the corporate parties broadly asserted that the programs are designed to implement section 6(f) of the FTC Act, which permits the FTC to publish certain information it gathers, and further stated that the programs are designed to implement enforcement policies. At a later point, counsel pointed to the "composite effect" of the purposes to which the data might be put as evidence that the programs prescribe law or policy.



corporate parties' contentions of regulatory purpose are far too attenuated to convince the court to decide that the special reports programs are designed to implement or prescribe law or policy.

Because of its decision on this issue, the court need not decide whether the LB and CPR programs meet the other two definitional requirements of a rule: generalized or particular applicability and future effect. The court has serious doubts whether the corporate parties correctly apply those standards to the present cases, but such a determination is unnecessary to the conclusion that the programs do not constitute rules under the APA.[17]

The court need not rely solely on its own interpretation of what implements or prescribes law or policy to conclude that a special reports program does not constitute rulemaking under section 551. Only one case, other than Judge Schwartz' preliminary decision, has been cited by the parties on the question of whether agency information-gathering through the requirement of special reports constitutes rulemaking. *United States* v. *W. H. Hodges & Co.*, 533 F.2d 276 (5th Cir. 1976). In *Hodges*, the Fifth Circuit considered an order by the Secretary of Agriculture directing 38 stockyard marketing agencies to file a special report in the course of an investigation of rates charged by the markets. The Secretary required these reports pursuant to his authority under the Packers and Stockyards Act,[18] a statute that expressly incorporates section 6 of the FTC Act to give the Secretary the authority to order that special reports be filed. In response to the objection that the special reports orders

[17] For the same reasons the court does not consider the FTC's claims that, even if the programs are rules, they fall within the section 553 exception for "general statements of policy."

[18] 7 U.S.C. § 222.

constituted rulemaking under the APA, the Fifth Circuit held:

> The order at issue here was clearly investigatory in nature, as opposed to an adjudicatory or rule-making process, and hence not subject to the procedures governing rule-making outlined in the APA. *Cf. Genuine Parts Co.* v. *F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971); K. Davis, *Administrative Law Treatise*, § 3.01 at 159, n. 1 (1958).

533 F.2d at 278. The corporate parties attempt to distinguish this case on the ground that the special report orders concerned a focused investigation of rate practices and sought information kept in the normal course of business.[19] The corporate parties then reiterate their contention that the LB and CPR programs do not constitute investigations. Yet the court is not convinced that these information-gathering programs conceptually or in legal effect constitute more than investigations despite the large number of corporations ordered to file the special report forms.

In addition, the APA itself appears to distinguish the concepts of rulemaking, adjudication, and ancillary matters such as investigations or reports requirements. Section 553 deals with rulemaking requirements, section 554 concerns adjudications, and section 555 is entitled "Ancillary matters." Section 555(c) provides that "requirement of a report . . . or other investigative act or demand may not be issued, made, or enforced except as authorized by law." 5 U.S.C. § 555(c). Although the APA does not explicitly state that rulemaking and reports requirements thus are mutually exclusive, the juxtaposition of these

[19] The FTC contends, as to the latter point, that the respondents in *Hodges* claimed that the material sought was not available in the ordinary course of business. The Fifth Circuit did not answer this question.



sections makes that a not unreasonable inference. Indeed, the chief House sponsor of the APA, Representative Walter, explained during the APA's consideration that the "bill carefully distinguishes between these basic types of administrative regulatory powers." 92 Cong. Rec. 5648 (1946). The three basic types of regulatory administrative operations mentioned by Representative Walter included rulemaking, adjudication, and compulsory action. Walter delineated the third category as follows:

> I refer to the compulsory action of administrative agencies when they issue subpoenas, require records or reports, or undertake mandatory inspections. These functions are investigative in nature. The investigation may be made in connection with their legislative or judicial functions, or it may be made for the purpose of submitting a report to Congress or to refer prosecutions to a grand jury. Whatever the purpose, the administrative arm is given power to require information to be submitted to it.

*Id.* The court is aware that Judge Schwartz reached an opposite decision from that of this court on the conclusions to be drawn from the subdivisions of the APA and the legislative history.[20] The differences of opinion may not be irreconcilable, however, to the extent that Judge Schwartz held only that section 555 does not absolutely preclude a finding that a special reports program could be subject to rulemaking requirements.[21] This court does not conclude that section 555 prohibits such a finding in all cases, only that an inference can be drawn from the subdivisions of the APA and its legislative history

[20] A. O Smith Corp. v. FTC, 396 F. Supp. 1125, 1133 (D. Del. 1975), *rev'd on other grounds*, 530 F.2d 515 (3d Cir. 1976).

[21] *Id.* ("The Court cannot hold that Congress intended in Section 555 to obviate the applicability of all other procedural provisions of the APA.").

that would make a determination that a special reports order constitutes rulemaking doubtful.[22]

Finally, the court believes that the FTC's "characterization of its own proceeding is entitled to weight, and that characterization may in turn have relevance in determining the applicability" of the APA rulemaking requirements. *ITT* v. *Local 134, Electrical Workers,* 419 U.S. 428, 441 (1975) (applicability of APA adjudication provisions). The corporate parties do not dispute that the FTC has maintained that the APA rulemaking provisions do not apply to its special reports program. The Quarterly Financial Reports Program, the early CPR Program, and the Premerger Notification Program all provide evidence that the Commission has never considered the rulemaking requirements of the APA to apply to a special reports program. Therefore, although an agency's characterization of the applicability of the APA is entitled to no more than "weight" and cannot be used to disguise the true nature of agency action, in this instance the FTC's longstanding interpretation of the APA adds support to the court's conclusion that the LB and CPR programs do not constitute rulemaking.

Thus the court concludes that the programs do not implement or prescribe law or policy and do not fit the definition of rulemaking. The *Hodges* decision supports this conclusion, as do the subheadings of the APA itself, its legislative history, and the FTC's longstanding interpretation of the applicability of the APA rulemaking provisions. Having so concluded, the court need not and does not consider whether the FTC complied with the APA requirements for rulemaking, 5 U.S.C. § 553.

[22] The House Report accompanying the APA noted that section 555 prescribed the rights of private parties in miscellaneous respects that might be "incidental to rulemaking, adjudication, *or the exercise of any other agency authority.*" H.R. Rep. No. 1980, 79th Cong., 2d Sess. 1206 (1946) (emphasis supplied).



## III. Census Act

The corporate parties claim that the CPR program[23] violates section 9 of the Census Act, 13 U.S.C. § 9.[24] This contention is based on the assertion that the CPR survey seeks the same information the corporate parties provide to the Bureau of Census for its quinquennial Census of Manufacturers in the form of value of shipments data by establishment and 5-digit Census product code for the year 1972. The FTC concedes that one purpose of the CPR program is to produce individual company data that it can compare to published Census aggregates. A determination of whether the CPR program is unlawful because it violates the confidentiality provisions of sec-

[23] The corporate parties' Census Act claims also encompass the LB program to the extent that the LB form seeks value of shipments data by Census definitions.

[24] Section 9 provides, in relevant part:

> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

tion 9 of the Census Act requires analysis both of the 1962 amendment to that Act and of the relevant caselaw.

No case before 1962 held that section 9's protection extended beyond the actual Census form, copies of it, or the actual data schedules submitted to Census. In *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958), the district court considered whether private steel producers could obtain Census reports of other steel manufacturers from the Department of Commerce. Judge Weinfeld held that the Census Act protected the Department of Commerce from compelled disclosure of the reports.[25] In *Federal Trade Commission* v. *Orton*, 175 F. Supp. 77 (S.D.N.Y. 1959), the district court held that the FTC could not subpoena certain data schedules submitted by respondent company to the Bureau of Census. In upholding the protection of Census data under section 9, the court noted that the FTC sought "the data not in order to get the facts which underlie the statistics, but rather to get the compiled statistical data in the particular manner in which it was prepared by the respondent. . . ." *Id.* at 80. Thus neither *Bethlehem Steel* nor *Orton* presented the question at issue here, since in the former case the actual reports were sought while in the latter case the FTC sought the "actual schedules submitted to the Bureau." *Id.* at 78.

The Supreme Court considered *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), to resolve a conflict between the circuits on the question of whether the Census Act protected a company's retained file copy of the report

[25] The corporate parties argue that Judge Weinfeld's use of the term "information" instead of "report" at certain points in the opinion demonstrates that *Bethlehem Steel* fairly can be read for the proposition that not only the report but the information contained therein is protected by section 9. To the extent that Judge Weinfeld intended "information" to mean more than a reference to the reports themselves, that issue was not before the court and statements thereon were just dicta.



sent to Census. The Seventh Circuit decided that the retained file copies merited section 9 protection,[26] while the Second Circuit determined that the file copies did not so qualify.[27] The Supreme Court affirmed the Second Circuit, holding that section 9 did not protect a company's retained file copies from compelled disclosure. 368 U.S. at 218-20.

Soon thereafter, in response to the *St. Regis* decision, Congress amended section 9 of the Census Act to add the following language:

> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

13 U.S.C. § 9(a). There can be no doubt that this amendment was intended to overrule legislatively the Supreme Court's holding in *St. Regis*. The key inquiry before this court, however, is whether the amendment was intended to protect more than the reports themselves or copies of them.

In the court's mind, the legislative history of the 1962 amendment provides persuasive evidence that Congress did not intend to prohibit such programs as the CPR

[26] FTC v. Dilger, 276 F.2d 739 (7th Cir.), *cert. denied*, 364 U.S. 882 (1960).

[27] United States v. St. Regis Paper Co., 285 F.2d 607 (2d Cir. 1060), *aff'd*, 368 U.S. 208 (1961).

Survey in enacting the amendment. The House and Senate Reports refer consistently to "copies" of Census Reports.[28] A letter from the Secretary of Commerce, included in both reports, assured the Congress that the amendment would not impair the information-gathering authority of regulatory agencies as it existed prior to the *St. Regis* decision.[29] The Secretary explained further:

> Furthermore, the ability of a regulatory agency to formulate inquiries, even ones identical with those asked by Census, would not be affected. The only restriction would be that the inquiry would not demand an answer by definition identical with that furnished the Census Bureau in another context and for another purpose.

Senate Report at 4, House Report at 7. These two sentences go to the heart of the matter, for while the FTC in the CPR program has asked questions that may be answered with Census data, it has not insisted that companies supply the Census data itself. To the extent that these two sentences from the Secretary's letter can be construed harmoniously, this distinction would appear to be significant.[30] Perhaps even more significant is the fact that the original House bill would have protected "information, reports, and other data" instead of merely "copies." H. 10569, 82d Cong., 2d Sess. (1962). The limiting of the scope of the amendment was recommended by the Secretary of Commerce to "avoid any possibility that [the amendment] might be construed to affect documents

[28] S. Rep. No. 2218, 87th Cong., 2d Sess. (1962); H.R. Rep. No. 2437, 87th Cong., 2d Sess. (1962).

[29] Senate Report, *supra*, at 4; House Report, *supra*, at 7. The court already has indicated that it interprets the state of the law prior to *St. Regis* differently than the corporate parties.

[30] *See, e.g.*, Brief for the United States, St. Regis Paper Co. v. United States, 368 U.S. 208 (1961), at 30-31.



other than file copies of census reports . . . ." House Report, *supra*, at 5. In sum, the legislative history surrounding the passage of the 1962 amendment to section 9 provides impressive evidence that Congress did not intend to create blanket protection for all materials arguably related to the Census Reports.

The corporate parties' primary remaining contention, since the plain words of the amendment and the legislative history do not support their interpretation, is that the FTC should not be permitted to attain indirectly what it could not attain directly, or else the confidentiality protections anticipated by section 9 would be emasculated. Indeed, there is much to be said for the policies of confidentiality underlying the enactment of section 9. The protections of section 9 undoubtedly play an important role in ensuring the completeness and accuracy of the reports submitted to Census.[31] Yet the court cannot simply rely solely on this policy consideration in determining this issue, because it competes against another, equally legitimate policy consideration that calls for a narrower interpretation of section 9 protections. The court also must consider an agency's legitimate needs for certain data, including data arguably similar to that filed in Census Reports, in order to perform its statutory duties. Value of shipments data, for example, can be of great importance in antitrust analysis and prosecution.[32] Thus

[31] *See* United States v. IBM, 1975-2 Trade Cas. ¶ 60,383 (S.D. N.Y. 1975); FTC v. Orton, 175 F. Supp. 77 (S.D.N.Y. 1959); United States v. Bethlehem Steel Corp., 21 F.R.D. 568 (S.D.N.Y. 1958). *See also* St. Regis Paper Co. v. United States, 368 U.S. 208, 228-29 (1961) (Black, J., dissenting).

[32] *See* Affidavit of Frederic M. Scherer, Director, Bureau of Economics, FTC, February 18, 1976, FTC Exhibit X; Affidavit of Michael L. Glassman, Assistant Director for Economic Evidence, Bureau of Economics, FTC, February 18, 1976, FTC Exhibit Y; Affidavit of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice, February 19, 1976, FTC Exhibit DD.

the court must balance the corporate parties' expectation of confidentiality with the FTC's legitimate information-gathering needs and cannot give maximum potential expression to policy considerations of confidentiality. Any confidentiality privilege granted by section 9, therefore, is but a qualified privilege that must be weighed in conjunction with the FTC's right to collect relevant data.

The court is convinced, moreover, that the Census Act itself, both before and after the 1962 amendment, properly discerned and balanced the competing policy considerations. Section 132 of the Act, 13 U.S.C. § 132, provides that

> nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information.

In addition, section 8 of the Act, 13 U.S.C. § 8, identifies certain circumstances in which the Secretary of Commerce may disclose Census data. The 1962 amendment protected "copies" rather than "information," and the legislative history makes clear that the amendment was not designed to impair an agency's information-gathering authority. House Report, *supra* at 7.

For these reasons, the court finds the corporate parties' claims concerning the Census Act to be unsupported by the wording of the Act itself, the relevant caselaw, the circumstances surrounding the 1962 amendment, or the policy considerations underlying the Act.

## IV. Federal Reports Act

The corporate parties base a number of challenges to the LB and CPR programs on the Comptroller General's actions pursuant to his clearance review function over independent regulatory agencies' information-gathering activities under the Federal Reports Act, 44 U.S.C.



§§ 3501-3512. Several issues arise from these claims: whether judicial review of the Comptroller's actions is unavailable because the matter is committed to agency discretion; whether the Comptroller applied the correct legal standard in performing his function under the Act with respect to the LB and CPR programs; and whether the Comptroller's clearance of these forms was in any case arbitrary, capricious, or an abuse of his discretion. For the reasons enumerated below, the court does not believe that the corporate parties' claims form a basis for invalidating these programs.

### A. *Availability of Judicial Review*

This court previously has determined that judicial review of the Comptroller's actions under the Federal Reports Act is not barred by a Congressional intent to preclude review or by the availability of an adequate alternative remedy in court.[33] One further claim, raised by the FTC but not the Comptroller, suggests that the Comptroller's determinations under the Act are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception to the general rule of reviewability, if applicable, would preclude judicial review in this instance.

The FTC relies primarily on two cases finding that the Comptroller's actions under the Act are committed to his discretion. In *General Electric Co.* v. *FTC,* 411 F. Supp. 1004, 1006 (N.D.N.Y. 1976), the district court found the Comptroller's decision committed to his discretion because "the statute characterizes his response to the agency as 'advice.'" *Id.* at 1006. Similarly, in *Westinghouse Electric Corp.* v. *Federal Trade Commission,* 1976-1 Trade Cas. ¶ 60,871 (S.D. Ohio 1976), the court found the Comptroller's decision committed to his discretion "because the statute characterizes the Comptroller General's response to the agency as 'advice.'" *Id.* at 68,816. The FTC also

[33] Memorandum Opinion of Jan. 31, 1977, at 22-24.

asserts that no case exists holding the Comptroller's determinations under the Act to be reviewable.

The court cannot agree with the conclusion of the FTC and the two district courts.[34] The committed to agency discretion exception to APA reviewability is a "very narrow" one. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). The exception should be invoked only where a particular statute is drawn in such broad terms that there is in effect no law to apply in a given case. *Id.*, citing S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). The Federal Reports Act, however, clearly sets forth two criteria under which the Comptroller is to make his review: avoiding unnecessary duplication and minimizing compliance burden.[35] The fact that the statute also characterizes the Comptroller's response to the agency as "advice" does not diminish the standards set by the Act for his review.[36] For these reasons the court concludes, at least as to whether the Comptroller considered duplication and burden, that there is law to apply and that judicial review of the Comptroller's actions is not wholly barred.

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[34] The court should note that in both *Westinghouse* and *General Electric* the courts made this determination in one sentence without extensive analysis. In both cases, the courts decided to transfer the action; the comments on the Federal Reports Act were not critical to that decision.

[35] 44 U.S.C. § 3512(b) provides:

> In carrying out the policy of this section, the Comptroller General shall review all existing information gathering practices of independent regulatory agencies as well as requests for additional information with a view toward—
>
> (1) avoiding duplication of effort by independent regulatory agencies, and
>
> (2) minimizing the compliance burden on business enterprises and other persons.

[36] Indeed, Congress may have intended "advice" in the sense of communication or notice as well as in the sense of a recommendation or opinion.



B. *Appropriateness Inquiry*

The corporate parties contend that the Comptroller applied the incorrect legal standard in considering the LB and CPR forms insofar as he did not make a separate, substantive evaluation of the proposed forms' "appropriateness." This claim stems from the corporate parties' interpretation of certain language of the Act that mentions appropriatness:

> While the Comptroller General shall determine the availability from other Federal sources of the information sought and the *appropriateness* of the forms for the collection of such information, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information. If no advice is received from the Comptroller General within forty-five days, the independent regulatory agency may immediately proceed to obtain such information.

44 U.S.C. § 3512(d) (emphasis supplied). The corporate parties suggest that appropriateness be construed in the sense of suitability for intended purpose, while the FTC and the Comptroller argue that appropriateness is merely a short-hand reference to the Comptroller's burden inquiry. The Comptroller concedes that he did not engage in a wide-ranging, substantive inquiry into the proposed forms' appropriateness.

The court is not convinced that Congress intended to create an entirely new substantive review criterion in this reference to appropriateness. First, the term appears only once in the Act, in a phrase qualifying the reservation of the determination of necessity to the agency. Second, in the sections of the Act that appear designed to detail the Comptroller's review criteria, only the burden and duplication standards are mentioned. *See* 44 U.S.C.

§§ 3512(a), (b). Finally, the court believes that any substantive appropriateness inquiry by the Comptroller might well impermissibly compromise the express statutory provision reserving determination of need for the information to the agency. *Id.* § 3512(d). Rather, the court interprets the reference to appropriateness, as does the Comptroller himself,[37] as a short-hand reference to the burden inquiry. The legislative history contains no indication that an independent, substantive appropriateness inquiry was contemplated. *E.g.*, 119 Cong. Rec. 24085 (1973) (remarks of Senator Bentsen). The court's conclusion thus seems inevitable from a fair reading of the Act as a whole.

C. *Duplication*

The corporate parties suggest that the Comptroller's treatment of the question of unnecessary duplication was insufficient to fulfill his responsibilities under the Act.[38] This claim relates to the fact that the Bureau of Census collects certain of the same data sought in the LB and CPR programs and publishes the data in aggregate form. The corporate parties admit, as they must, however, that the FTC is unable to obtain from Census the individual

[37] The Comptroller has held the view that appropriateness does not require a separate, substantive inquiry ever since he promulgated regulations to implement the Act. *See* 39 Fed. Reg. 24346 (1974). The court believes that the agency's interpretation of its obligations under the Act is entitled to weight. Judge Schwartz in Delaware apparently also found that the Comptroller's review function relates only to burden and duplication. A. O. Smith Corp. v. FTC, 396 F. Supp. 1125, 1132 (D. Del. 1975), *rev'd on other grounds*, 530 F.2d 515 (3d Cir. 1976).

[38] The corporate parties appear to argue in this regard more that the clearance of the forms was arbitrary and capricious than that the Comptroller applied an incorrect legal standard. There is no question that the Comptroller considered the question of unnecessary duplication. The court decides this question in any case under the standards of 5 U.S.C. § 706(2).



company data it desires because of the protections accorded by the Census Act.[39] Therefore, the court can hardly accuse the Comptroller of acting arbitrarily or capriciously in not disapproving the forms on the ground that they unnecessarily duplicate the effort of the Census Bureau. The individual company data, for which the FTC expresses a need that the Comptroller cannot challenge, is simply not available to the FTC; in view of the requirements of the Census Act, any duplication that has occurred could hardly be termed unnecessary by the Comptroller, and his approval should not be invalidated on that ground.[40]

D. *Burden*

The corporate parties raise several complaints with respect to the Comptroller's handling of the question of minimum burden. First, the corporate parties contend that an adequate burden assessment cannot be made in the absence of a concomitant assessment of the meaningfulness of the data to be collected.[41] The court cannot find, however, that the Act requires by implication such a detailed cost-benefit analysis. The plain words of the Act itself, the 45-day limitation on the Comptroller's consideration of proposed forms, and the reservation of need determination to the agency all point to a more limited interpretation of the

[39] Indeed, the corporate parties elsewhere argue that the FTC cannot even obtain the underlying information from them. *See* § III, *supra*.

[40] Nor can the court say that the Comptroller should have disapproved the forms because of overlap with the Quarterly Financial Reports Program or the Premerger Notification program, since any overlap with these programs is slight.

[41] The corporate parties' point is that any burden would be too high for a meaningless program.

Comptroller's responsibilities with respect to assessing burden.[42]

Second, the corporate parties argue that the Comptroller failed to obtain a valid estimate of compliance burden for the CPR form. The court finds no merit to this claim, which rests on the premise that the FTC expected the companies to use their Census Reports in completing the form. The court has rejected the corporate parties' Census Act claim, § III, *supra*, and in any case the FTC's burden estimates were based on the availability of underlying data rather than the Census Reports themselves.

Third, the corporate parties contend that the Comptroller could not rationally have approved the forms and at the same time have voiced such major concerns about the problem of burden. The LB clearance letter terms burden problems as "still incompletely resolved." The CPR program similarly was the subject of numerous comments alleging that the compliance burden was "grossly underestimated." The court rejects the corporate parties' final avenue of attack on burden. The Act does not require a Comptroller's finding of no burden; the Comptroller weighed the evidence on both sides and determined to clear the forms. The Comptroller noted that improvements in the LB form lowered the compliance burden from that of the 1973 form, and it is clear that the Comptroller considered and rejected claims of undue burden in the CPR program.

### E. *GAO Regulations*

The corporate parties also contend that the clearance of the CPR form was invalid for failure to comply with the General Accounting Office Regulations promulgated to implement the Federal Reports Act, 4 C.F.R. §§ 10.1-10.12. The corporate parties charge defects in required FTC solicitation of views of persons to be affected,[43] and in the failure of the FTC's supporting statement submitted to GAO to detail the necessity for the program,[44] the major problems as to which agreement could not be reached in consultations outside the agency,[45] and the extent to which comments received from persons outside the agency are reflected in the plan.[46]

[42] The court would reserve judgment on this question if, as in counsel's hypothetical at oral argument, the complete and utter lack of meaningfulness of the form for its stated purpose were so patent that a child could recognize it. The value of the LB and CPR data, however, does not present this question, as expert economists disagree on it.



The court considers it unnecessary to determine whether the alleged violations of these regulations in fact occurred. The regulations in question concern intra-government relations and are essentially intended to facilitate GAO review and clearance. In the court's mind, the regulations do not confer rights on private parties and do not preclude the GAO from waiving objections to noncompliance. Moreover, the regulations contain their own remedy for noncompliance: suspension or discontinuance of GAO review and a tolling of the 45-day period upon a finding that the deficiency "precludes complete and effective review." 4 C.F.R. § 10.9(a).

The Supreme Court considered a similar issue in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970). There the ICC had granted a motor carrier a temporary operating authority. This action was challenged by protesting carriers on the ground that the ICC did not comply with its own regulations concerning processing of such temporary applications. Noting that the ICC should be given a "measure of discretion in administering its own procedural rules," the Court found that the regulations were designed for the purpose of providing the ICC with

[43] 4 C.F.R. § 10.3(b)(2).

[44] *Id.* § 10.10(c)(1)(i).

[45] *Id.* § 10.10(d)(5).

[46] *Id.*

sufficient information to make a decision rather than to confer important procedural benefits on third parties. *Id.* at 538. The Court reaffirmed the general principle that an agency may relax procedural rules adopted for the orderly transaction of business and stated that judicial review of such action was available only upon a showing of "substantial prejudice." *Id.* at 539.

The court finds this reasoning persuasive in this case. The corporate parties have demonstrated neither substantial prejudice nor that the regulations here were intended to confer important procedural rights on third parties.[47] The court believes that the GAO should be given some latitude in determining what constitutes adequate compliance in administering the regulations under the Act. In view of the fact that the court can find no substantial prejudice flowing from the alleged violation of the particular regulations at issue here,[48] the CPR program should not be invalidated on this ground.

F. *Experimental Clearance*

The corporate parties, finally, contend that the 1974 LB form was cleared by GAO on an essentially "experimental" basis. The GAO clearance letter noted, *inter alia*, that the FTC had made "constructive efforts" to minimize burden, and that "a rather long test period of data collection and analysis will be required to fully reconcile FTC's data needs with minimum burden." These comments, the corporate parties suggest, taint the Comptroller's clearance on the burden question by introducing irrelevant factors and by failing to determine that the form assures a minimum burden; the period of experimentation contemplated, they claim, required the GAO to disapprove rather than approve the form.

[47] As to the latter point, the corporate parties argue that the regulations force agencies to shoulder a planning burden and assure the public a basis on which to comment to the GAO. These incidental effects, admittedly meant to facilitate GAO review, can hardly qualify as an intent to confer rights on private parties.

[48] The corporate parties, in fact, appear to have been successful in making their views known to the GAO. The FTC made the views of other agencies known to the GAO and submitted additional material to it upon request. The corporate parties have not made a convincing showing of prejudice, much less substantial prejudice.



The court does not so construe the Comptroller's comments about the FTC's efforts to reduce burden. The court believes that the Comptroller did make the requisite burden determination; there exists in such programs an inherent tension between burden on the one hand and uniformity, accuracy, and value on the other. The Comptroller's statements reflect this awareness and essentially suggest that further efforts to minimize burden will depend on the FTC's definition of its data needs. The clearance, rather than experimental, was unconditional; the Comptroller merely offered his advice and observations on the continued implementation of the LB program in terms of a minimum burden consistent with the FTC's need for information. Indeed, the Comptroller recognized that the FTC had made strides in reducing burden in the 1974 form, although the Comptroller had approved the presumably more burdensome 1973 form too.

The court therefore finds no merit in any of the corporate parties' objections to the Comptroller's actions pursuant to the Federal Reports Act with respect to the LB and CPR programs. It thus refuses to invalidate either program on a ground stemming from the Act. The court does not find the Comptroller's actions in clearing the LB and CPR forms to have been arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

## V. Publication of Trade Secrets

The corporate parties assert that the CPR program must be invalidated because it envisions publication of "trade secrets" in violation of section 6(f) of the FTC Act, 15 U.S.C. § 46(f). The resolution of the Commission authoriz-

ing the CPR program would permit public disclosure of individual company data as early as 1978; the corporate parties argue that data supplied for the CPR Survey, including costs, sales, assets, value of shipments, and intercorporate relationships, constitutes trade secrets within the meaning of section 6(f). Section 6(f) provides:

> The Commission shall also have the power—[t]o make public from time to time such portions of the information obtained by it hereunder, *except trade secrets* and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and and decisions in such form and manner as may be best adapted for public information and use.

15 U.S.C. § 46(f) (emphasis supplied).

Although the corporate parties claim that the intent to publish these trade secrets requires the court to invalidate the entire CPR program, the court on this ground at most could prohibit the FTC from publishing this data, not from collecting it.[49] Even if the court sustained the corporate parties' contention in full, that ruling would have no effect on the Commission's right to collect and the corporate parties' obligation to provide the CPR data.

The court finds it unnecessary to reach the merits of the corporate parties' claim that the CPR data constitutes protected trade secrets under section 6(f) and that its publication is thereby prohibited. The FTC has made no final decision about whether to publish individual company CPR data; the corporate parties point to the Commission resolu-

[49] The court quickly can reject any suggestion that the FTC seeks the CPR data only for the purpose of publishing it, since it is uncontested that the Commission also desires to develop an internal data bank with this data.



tion authorizing the CPR program as evidence of the determination to publish. That resolution, though, simply states: "It is further resolved that no information for individual companies will be published before January 1, 1978." Resolution Authorizing and Directing the Collection of Economic Reports, July 29, 1975. The court cannot ignore, however, that publication of individual company data is an option the FTC deliberately has left open and apparently intends to employ at some later date. Nevertheless, it seems premature and perhaps unnecessary for the court to determine whether CPR data is protectible as trade secrets before the Commission has made a decision to publish that data. Even if the FTC has a present intention to publish the data at some unspecified later date, time or events might modify or reverse that intent.

The FTC itself will be in a position to rule on specific requests for confidential treatment[50] only after the information is submitted to the agency. *See Federal Trade Commission* v. *Texaco, Inc.*, No. 74-1547 (D.C. Cir. Feb. 23, 1977), slip opinion at 43. Perhaps the corporate parties will be able to convince the Commission that confidential treatment of their data is necessary after they submit the CPR form and thus are able to pinpoint more precisely the potential harm.[51] In order to protect the corporate parties from any precipitous action on the part of the FTC, the court will require, as did the Court of Appeals in *Texaco, supra at* 43-44, that the Commission give ten days' notice to any company of a decision to publish that company's in-

[50] For example, Milliken claims a particular confidentiality hazard flowing from its status as a privately-held company and could submit its evidence of specific injury to the FTC after filing the CPR form.

[51] The court does not consider the Commission's denial of motions to quash the CPR orders dispositive of this inquiry, as the denial of the motions to quash dealt with the claims that the companies did not have to file the CPR form at all because the data consisted of trade secrets.

dividual data before actually doing so. In this way, the court does not preclude opportunity for a later judicial inquiry into the trade secrets claim, if necessary, in a setting where the inquiry and dispute would be framed concretely.[52] Therefore the court does not consider the trade secrets claim to preclude FTC collection of the CPR data and believes any claim concerning restraining publication of individual company data to be premature in the absence of a final decision to publish that data.

### VI. Adjudicative Respondent's Claims

Nine of the corporate parties currently are engaged in adjudicative proceedings before the Commission.[53] They suggest that the LB and CPR programs pose particular hazards to the protection of their legitimate procedural rights in the adjudicative proceeding. Specifically, the nine fear that the information received from these companies in the LB and CPR programs would achieve significant discovery not authorized by the Administrative Law Judge in those procedeings, thus violating the FTC's own rules of procedure, the equality requirement of the APA, and due process of law.

As in the corporate parties' trade secret claim, it is necessary for the court to identify the consequences that would flow from a finding that the nine companies' contention is meritorious. First, the potential jeopardy of procedural

[52] The court might have hesitated to find the claim premature at this time had the corporate parties presented a compelling showing that the CPR data constitutes trade secrets. The question, however, is at best a close one. Further, not all companies have detailed specifically the competitive harm disclosure would precipitate, and the court is unable to make the required determination without individualized information.

[53] ARCO, Exxon, Gulf, Mobil, Shell, Standard of California, Standard of Indiana, and Texaco are respondents in the *Exxon case*, FTC Docket No. 8934, while General Mills is a respondent in the *Kellogg* case, FTC Docket No. 8883.



rights in the adjudicative proceedings cannot impinge upon the FTC's right to collect the information in question, only upon the use to which that information might be put. Any other conclusion would suggest a blanket immunity from special reports orders for any company engaged in an adjudicative proceeding before the Commission. Such a determination would unreasonably restrict the FTC's legitimate information-gathering activities. Second, the corporate parties' claim, if valid, does not require sequestration of the LB and CPR data from complaint counsel in the *Exxon* and *Kellogg* proceedings. Unsurprisingly, there has been no suggestion of bad faith or that the LB and CPR programs have been developed for the partial purpose of providing indirect discovery for FTC complaint counsel in these proceedings. There has been no evidence to suggest that present complaint counsel intend or even wish to use the LB and CPR data in these adjudications.[54] The court concludes that a sequestration order therefore would be premature at this time; the nine corporate parties have not demonstrated an intent by complaint counsel to use the LB and CPR data that could trigger the relevant inquiry.

More important, the court is reluctant to enter the discovery phases of the *Exxon* and *Kellogg* proceedings. The respondents in those proceedings can raise before the Administrative Law Judge their contentions as to use of LB and CPR data should that issue in fact arise. The ALJs are intimately familiar with those cases and the scope of discovery authorized. Should violations of the discovery orders or of the FTC's procedural rules be alleged, the ALJs would be in the best position to determine that claim. If data obtained from the LB and CPR reports is offered in evidence in those cases, the corporate parties will have the opportunity to object to the introduction of such evidence. And if the corporate parties suspect that LB and CPR data

[54] Indeed, such a suggestion would appear absurd in the *Kellogg* case, as the parties have indicated the evidence on which they intend to rely and the evidentiary hearing already has begun.

has provided leads for the development of evidence offered, they again will have the opportunity to object to the tainted evidence before the ALJs. *See Atlantic Richfield Co.* v. *Federal Trade Commission*, No. 75-2802 (5th Cir. Feb. 4, 1977), at 1355-56. That the ALJ in *Exxon* has firm control of discovery matters is evidenced by his discovery order of November 11, 1976, limiting the discovery to be permitted complaint counsel. The court thus will not entertain the nine companies' arguments before the ALJs have a chance to rule on these issues, should such a ruling ever become necessary.[55]

Moreover, the corporate parties could seek additional review of any alleged improper use of the LB and CPR data before the Commission itself. And if a cease and desist order is entered, these respondents would be entitled to judicial review. 15 U.S.C. § 45(c). In view of this well-defined avenue of review—ALJ to Commission to court—for claims of improper discovery, and in light of the fact that the threatened harms may never occur, the court declines to weigh the merits of the corporate parties' procedural hazards claim at this time on the ground that it is raised prematurely.

## VII. Relevance and Burden

The corporate parties have challenged the FTC's use of compulsory process in the LB and CPR orders on grounds

[55] The corporate parties have based some of their arguments on a misconception of the ALJ's power to fashion an appropriate remedy for improper use of the data. It is true that ALJs cannot issue section 6(b) orders, but it hardly follows that they are without power to exclude from evidence the information gathered from a section 6(b) investigation as improperly discovered. *See* Horizon Corp., FTC Doc. No. 9017, July 28, 1976, at 2.



of lack of reasonable relevance and undue burden.[56] The court considers these claims in a somewhat unusual posture; only the FTC, and not the corporate parties, has moved for summary judgment on this issue. The corporate parties contend that there exist genuine issues of material fact making the entry of summary judgment on this question premature as to either side. They suggest further discovery and evidentiary procedures before the court rules on relevance and burden. The FTC, of course, suggests that the question is ripe for disposition at this time.

### A. *Reasonable Relevance*

The FTC's investigation and special reports orders must meet a standard of reasonable relevance: the information sought must be "reasonably relevant" to the general purposes of the investigation. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Federal Trade Commission* v. *Texaco, Inc.*, No. 74-1547 (D.C. Cir. Feb. 23, 1977), slip opinion at 20-22 & n.23. The corporate parties make only an indirect challenge to relevance in this instance. In the LB programs, the corporate parties suggest a lack of reasonable relationship between the purposes of the program and the data sought to be collected, while in the CPR program the corporate parties stress the unsuitability of Census-type data for the FTC's purpose. It appears, however, that the corporate parties characterize these arguments as relating to the undue burden question.[57] Therefore,

[56] These challenges are made apart from the corporate parties' claims of arbitrary and capricious agency action under 5 U.S.C. § 706(2), and they should be evaluated under essentially the same standards employed in determining enforcement of an agency subpoena. *See, e.g.*, Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186 (1946). The court does not accept the corporate parties' contention that this case should be determined on different standards because statistical reporting programs are at issue.

[57] *See* Outline and Explanation of Corporate Parties Concerning Necessary Evidentiary Procedures.

the court similarly will consider the arguments in the context of the undue burden inquiry. Thus the corporate parties have not pointed out, and the court cannot identify, any direct relevance objection to the LB and CPR orders. It seems clear to the court that the orders are reasonably relevant to the general purposes of the LB and CPR programs: collection of financial information from certain large corporations. It is further clear that the court should interpret broadly the standard of reasonable relevance. *See FTC* v. *Texaco, supra,* slip opinion at 22-25 (and cases cited therein).

B. *Undue Burden*

The corporate parties also argue against enforcement of the FTC's compulsory process on the ground that the compliance burden is undue for the LB and CPR orders, making those orders unreasonable. Because the factual circumstances differ between the LB and CPR programs, the court will consider them separately.

(1) *LB Program:* The corporate parties suggest that the burden of complying with the LB orders would be undue for several reasons. The first of these reasons stems from the alleged lack of reasonable relationships between the stated purposes of the LB program and the data sought to be collected. The corporate parties' theory is that the absolute costs of compliance must be weighed against the suitability of the information sought for the stated purposes of the inquiry.[58] Identifying the Commission's purpose in the LB program as the development of "good market performance data" for antitrust and resource allocation purposes, the corporate parties suggest that the LB data is entirely unsuited for these purposes because of four deficiencies: (1) individual company LB data and published LB data aggregates would be noncomparable; (2) the LB aggregates to be published would not bear any reasonable relationship to economic data; (3) the LB aggregates to be published would not bear any reasonable relationship to market data; and (4) the LB aggregates to be published would be unreliable because of contamination caused by arbitrary and improper assignment to LB categories on a primary activity basis.

[58] The corporate parties cite *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186 (1946), and *FTC* v. *American Tobacco Co.,* 264 U.S. 298 (1924), for that proposition. The court does not so liberally read those cases, though it agrees that an information request could be unreasonable and thus an undue burden if wholly irrelevant to the general purpose of the investigation. *See Morton Salt, supra.*



The court disagrees with the corporate parties that such a wide-ranging inquiry into suitability is required in an undue burden challenge to the FTC's use of compulsory process.[59] The corporate parties do not go so far as to allege that the data to be collected is useless, and the data certainly appears to have some utility. The court is of the opinion that the corporate parties' argument must be limited to a claim of undue burden in the sense of cost of compliance when, as here, "the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *FTC* v. *Texaco, supra,* slip opinion at 39.

The corporate parties also hint that the cost of compliance with the LB program would be staggering. They contend that the program would require many companies to develop new accounting and reporting systems to generate and retrieve the data. At oral hearing, counsel for the corporate parties estimated the cost of compliance for some companies at "millions" of dollars. The FTC, on the other hand, has estimated the average compliance cost for the 1974 form to be $24,000, with a range from under $10,000 for some companies to $75,000-$100,000 for certain large

[59] The court believes, however, that a limited inquiry into suitability may be appropriate in determining the corporate parties' claim that the FTC acted arbitrarily in implementing the LB program.

conglomerates. The FTC asserts that company forecasts are inflated in light of the fact that certain estimates are permitted on the form; the FTC's own figures assume use of such estimates.

The court has some doubts that the corporate parties will show sufficient burden to justify this court's refusal to enforce the LB orders. Common sense suggests compliance estimates of "millions" of dollars to be inflated. Since the LB orders are directed at many of the largest companies in this country, moreover, the corporate parties face an uphill battle showing that compliance "threatens to unduly disrupt or seriously hinder normal operations of a business." *FTC* v. *Texaco, supra,* slip opinion at 40. Many companies already have filed the LB form. Nevertheless, the record before the court is not sufficiently complete at this time to permit the court to resolve this question now.[60] Therefore the court will permit the corporate parties to submit additional affidavits on the issue of cost of compliance and permit the FTC to submit counter-affidavits.[61] In the court's view, no live testimony will be necessary at this time. Therefore the court will defer a decision on the corporate parties' cost of compliance challenge to the LB orders.

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[60] The record contains only affidavits submitted to the Commission and to Judge Schwartz in Delaware. The FTC strenuously contends that the corporate parties were obliged to submit affidavits in this case in order to oppose its motion for summary judgment. The corporate parties, however, rely on this court's July 30, 1976 order and their submission of a memorandum detailing needed discovery and evidentiary procedures as excusing the need to oppose the Commission's motion with affidavits.

[61] The court will limit the submission to five affidavits. The corporate parties have suggested that the financial representatives of a "small number" of the corporate parties could lay an adequate evidentiary foundation on this question if live testimony were presented. The court believes the same preliminary evidentiary foundation can be laid by means of affidavit.



(2) *CPR Program:* The corporate parties have not elucidated as precisely their challenge to the CPR program on the ground of undue burden.[62] They do charge that the Census-type data that the CPR program would collect is unsuited for any purpose other than publishing aggregates. To the extent that this contention includes the further claim that the compliance burden thus would be undue, the court finds the issue directly analogous to that discussed with respect to the LB program, *supra.* No sophisticated suitability analysis is required to determine the undue burden issue.

On the question of cost of compliance, the record again is somewhat incomplete. No affidavits were submitted to this court, although the record contains affidavits submitted to the FTC, the district court in Delaware, and the district court in the Southern District of New York. The corporate parties clearly do not claim as great a compliance burden for the CPR form as they do for the LB form, although they do contend the FTC estimates of cost of compliance are based on the use of Census data. While the court again considers it unlikely, on the basis of the evidence presently in the record, that the corporate parties will be able to make a sufficient showing of undue burden, it will permit them the opportunity to do so through submission of no more than five affidavits on the issue of compliance cost. The FTC will be permitted to submit counter-affidavits.

Accordingly, the only issue left to be resolved in the corporate parties' challenge to the Commission's use of compulsory process in the LB and CPR orders is whether the cost of compliance makes enforcement of the orders unreasonable because of undue burden. The court finds no genuine issues of material fact with respect to other claims of the corporate parties and finds the Commission's position correct as a matter of law.

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[62] The corporate parties claim that the Commission is responsible for this state of affairs, it having developed and implemented the CPR program in the dark.

## VIII. Arbitrary and Capricious Issues

The corporate parties contend that the adoption and implementation of the LB and CPR programs by the FTC was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the dictates of 5 U.S.C. § 706(2). The FTC has moved for summary judgment on the arbitrary and capricious issues, while the corporate parties believe these questions unripe for disposition because material factual issues remain.

A threshold question arises. The corporate parties have argued throughout that the LB and CPR programs constitute rulemaking. If that were true, even the FTC would concede that its actions constituted "agency action" within the meaning of section 706(2) and thus were subject to review under that section. *See* 5 U.S.C. §§ 701(b)(2), 551(13). The court has rejected the corporate parties' rulemaking claim, however, and the question is presented whether the FTC's action constitutes "agency action" under section 706(2). Although the court has been the beneficiary of hundreds of pages of legal memoranda in these actions, this narrow legal question has not been specifically addressed. The court believes that it could benefit from short memoranda on this question before deciding the FTC's motion for summary judgment on the arbitrary and capricious issues. The memoranda should not exceed ten pages in length and will be submitted simultaneously by both sides. No responses will be permitted, and no oral argument is necessary.

The court therefore will defer consideration of the FTC's motion as to these issues until it receives and considers the supplemental memoranda on the applicability of section 706(2) in light of this court's ruling on the rulemaking claim.

/s/ Thomas A. Flannery
United States District Judge



(Caption Omitted in Printing)

(Filed April 12, 1977)

**Order**

In accordance with the accompanying memorandum opinion, it is, by this court, this 12th day of April, 1977,

Ordered that the corporate parties' motion for partial summary judgment be, and the same hereby is, denied; and it is further

Ordered that the corporate parties shall submit any additional affidavits, not to exceed in number five each for the LB and CPR programs, on the issue of cost of compliance no later than April 25, 1977, and that the FTC shall submit any counter-affidavits on this issue, not to exceed five each for the LB and CPR programs, no later than May 6, 1977; and it is further

Ordered that the FTC and the corporate parties each shall submit to the court a memorandum, not to exceed ten pages in length, addressed to the question of the applicability of 5 U.S.C. § 706(2) in light of the court's disposition of the rulemaking issue no later than April 20, 1977; and it is further

Ordered that the FTC give ten days notice to any party to this litigation before publishing any individual company CPR data; and it is further

Ordered that the Comptroller General's motion for summary judgment be, and the same hereby is, granted, and that he submit to the court an appropriate judgment no later than April 26, 1977; and it is further

ORDERED that the FTC's motion for summary judgment is granted as to all issues discussed in the accompanying memorandum opinion except the undue burden issue discussed in § VII of the memorandum opinion and the issues raised in § VIII of the memorandum opinion, as to which consideration of the FTC's summary judgment motion is deferred pending submission of the above-referenced materials.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE



(CAPTION OMITTED IN PRINTING)

(FILED JULY 11, 1977)

**Memorandum**

This memorandum represents the court's latest effort in determining challenges to the Federal Trade Commission's information-gathering activities with respect to the 1974 Line of Business (LB) report and the Corporate Patterns Report (CPR) survey. The court considered and decided various issues related to several motions to dismiss and motions for summary judgment in opinions issued January 21, 1977 and April 12, 1977. Several issues in the summary judgment motions remain, and the court undertakes to resolve them at this time. This memorandum deals with the following matters: (1) "agency action" and APA review; (2) corporate parties' motion for reconsideration; (3) FTC's motion for reconsideration; (4) corporate parties' motion to dismiss for lack of personal jurisdiction; and (5) undue burden in the sense of excessive cost of compliance. An appropriate Order accompanies this Memorandum.

## I. "AGENCY ACTION" AND APA REVIEW

The corporate parties have contended throughout that the court should review the actions of the FTC in implementing the LB and CPR programs in accordance with the standards of 5 U.S.C. § 706(2).[1] An initial issue arises of

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[1] 5 U.S.C. § 706(2) provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional rights, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

whether these programs constitute "agency action" within the meaning of section 706(2); both sides have submitted supplementary memoranda on this question to the court. For the reasons enumerated below, the court finds that the FTC's actions with respect to the LB and CPR programs do not constitute "agency action" and that APA-type review of the programs under an arbitrary and capricious standard is therefore unavailable to the corporate parties. Alternatively, even if APA review were available, the court concludes on the basis of the administrative record that the FTC's actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in conformance with the standards of section 706(2).

### A. *Agency Action*

The APA defines agency action as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). This court already has held that the programs are not rules. Memorandum of April 12, 1977. The FTC's actions with respect to LB and CPR can hardly be termed an agency license, sanction, or relief, and the corporate parties nowhere so contend. The APA defines an "order" as

> the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

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(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.



5 U.S.C. § 551(6). Although the FTC "ordered" the respondents in this action to file the LB and CPR forms, it is far from clear that this is the sort of order contemplated by the APA definition. Evidence exists suggesting that an APA "order" is an outgrowth of the adjudication process. Adjudication itself, for example, is defined as "agency process for the formulation of an order." 5 U.S.C. § 551(7). The corporate parties never have contended that the LB and CPR programs or orders constitute adjudication; it is clear to the court that they are not adjudications. *International Telephone and Telegraph Co.* v. *Local 134, Electrical Workers,* 419 U.S. 428, 442-44, 447 (1975); *Hannah* v. *Larche,* 363 U.S. 420, 442-44 (1960); *United States* v. *St. Regis Paper Co.,* 285 F.2d 607, 616 (2d Cir. 1960), *aff'd on other grounds,* 368 U.S. 208 (1961); *Federal Trade Commission* v. *Waltham Watch Co.,* 169 F. Supp. 614, 617-18 (S.D.N.Y. 1959). The investigative orders issued for the LB and CPR special reports thus are not adjudicative orders as defined by the APA; the word "order" can have various meanings in various contexts. *Investment Co. Institute* v. *Board of Governors,* No. 75-1822 (D.C.Cir. Jan. 14, 1977), slip opinion at 15.

This analysis of the statutory language of the APA is buttressed by the fact that the APA contains an explicit standards for enforcement of reports orders or other compulsory process. 5 U.S.C. § 555. That section provides:

> Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. . . . On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law.

5 U.S.C. §§ 555(c), (d). It seems unlikely to the court that Congress intended that agency process be reviewed under an "arbitrary or capricious" section 706 standard as well as under the expressly delineated section 555 standard. In-

deed, the Supreme Court has analyzed two cases involving the FTC's use of compulsory process under section 555 alone and not under section 706. *St. Regis Paper Co.* v. *United States*, 386 U.S. 208 (1961); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950). This suggests that review under section 555 alone is sufficient.[2]

Finally, this circuit appears to endorse the notion that FTC investigations[3] do not constitute agency action under the APA. In *Brandenfels* v. *Day*, 316 F.2d 375 (D.C. Cir. 1963), the court affirmed the dismissal of an action against the FTC on the ground that the suit was premature since the Commission was merely investigating plaintiff and had not brought—and might never bring—charges against him. The court concluded that the FTC had "taken no final action which is reviewable under the Administrative Procedure Act." *Id.* at 378. More recently, in *Gifford-Hill & Co.* v. *Federal Trade Commission*, 523 F.2d 730 (D.C. Cir. 1975), a case arising under the National Environmental Policy Act, the court found that an agency decision to institute an adjudicatory proceeding was not reviewable agency action. *Id.* at 732. The court noted in dictum that decisions to investigate would merit the same treatment as decisions to bring adjudicatory proceedings. *Id.* at 733 n.7.

In the face of this cumulative evidence that the FTC's use of compulsory process does not constitute agency action reviewable under section 706 standards, the corporate parties cite the APA's legislative history and several important cases in support of a contrary conclusion. Indeed, Congress did intend a broad definition of agency action. *See* S. Rep. No. 752, 79th Cong., 1st Sess. 12 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 21 (1946). The definition of agency action, though broad, is not without boundaries; the court already has considered the statutory language and has determined that compulsory process does not readily fit into the definition of agency action.

[2] The Court did indicate, however, that APA review might be available if the Commission issues a notice of default but then delayed in seeking enforcement while penalties accumulated. *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 654; *St. Regis Paper Co.* v. *United States*, *supra*, 368 U.S. at 226-27. In the present case, no notice of default has been issued.

[3] The court previously has found that these special reports programs do not constitute more than investigations in legal effect or in concept. Memorandum Opinion of April 12, 1977, at 11. No meaningful distinction can be drawn.



The corporate parties next rely on the Third Circuit's decision in *A.O. Smith Corp.* v. *Federal Trade Commission*, 530 F.2d 515 (3rd Cir. 1976). Although the court did not explicitly consider the definition of agency action, it assumed that the 1973 LB orders were agency action and then found them to be "final" agency action. *Id.* at 521-22. The question before the court was the propriety of preenforcement review. Thus, although the Third Circuit's finding is directly relevant to the issue before this court, the persuasive value of that finding is lessened because the Third Circuit appeared simply to assume that agency action was present.[4] Similarly, in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. (1971), a case on which the corporate parties place great reliance, the court did not consider whether agency action was involved before engaging in judicial review under the APA.[5]

Finally, the corporate parties rely on two cases in which agency action more informal than adjudication or rule-

[4] This silence is perhaps understandable since the district judge had found that the LB program constituted rulemaking; though the Third Circuit expressed no view on that issue, the district court's holding could have led the Third Circuit simply to assume that the LB orders presented reviewable agency action.

[5] The corporate parties urge a contrary inference from the silence: that the courts should give the notion of reviewable agency action a broad reach. Yet courts that fail to consider this question for one reason or another surely do not intend to abrogate the requirement under the APA that a court review only agency action under the standards of section 706.

making was held to be agency action. In *Independent Broker-Dealers' Trade Association* v. *Securities and Exchange Commission*, 442 F.2d 132 (D.C. Cir. 1971), the SEC had clearly stated its policy toward a particular practice and requested a stock exchange to abolish it. The court found that this amounted to agency action under the APA. *Id.* at 142. However, the court found that the SEC's action was the equivalent to a rule under the APA, while this court has rejected the corporate parties' rulemaking claim. Moreover, the D.C. Circuit did not hold in *Independent Broker-Dealers* that full APA review would be available in the circumstances; indeed, it held only that "limited judicial review" was proper to determine whether the agency acted *ultra vires*. *Id.* In essence, the D.C. Circuit found a sufficient regulatory impact to justify judicial review; this court rejected the corporate parties' rulemaking claim precisely on the ground, *inter alia*, that the special reports orders lacked the requisite regulatory impact. The corporate parties also cite the recent case of *Writers Guild of America, West, Inc.* v. *Federal Communications Commission*, 423 F. Supp. 1064 (C.D. Cal. 1976). There the court held that certain speeches by the FCC chairman and meetings between the chairman, FCC staff, and broadcasting executives constituted sufficient, albeit informal, agency action under the APA. *Id.* at 1085-86. That conclusion, to this court, is justified neither by the statutory definition of agency action nor by the present state of the caselaw.

Certain of the corporate parties have submitted an unsolicited supplemental memorandum to the court on this question. In it, they suggest that, whatever the court's view as to the CPR program,[6] the LB program presents an

[6] As to the CPR program, the court ruled on April 12, 1977 that consideration of the corporate parties' trade secrets claim was premature. This suggested to these corporate parties that the court considered the CPR program as less than an administrative whole, i.e., that the decision to collect the data could be separated from the decision to publish it.



administrative whole that includes the collection, aggregation, and publication of massive amounts of data on an annual basis. It is not clear to the court whether this claims seeks reconsideration of the court's conclusion that the LB program does not constitute a rule under the APA or whether these corporate parties merely wish to assert that the pervasive impact of the LB program require that APA review be accorded under an informal agency action theory, as in *Independent Broker-Dealers*. If the former, all corporate parties have a pending motion for reconsideration of the rulemaking decision that the court has under advisement; if the latter, the court has explained, *supra*, why it believes that neither the LB nor CPR programs require APA review under an informal agency action theory.

B. *APA Review*

The court finds, alternatively, that nothing in the administrative record or in the subsequent filings before the court demonstrate that the FTC's actions with respect to the LB and CPR programs were arbitrary, capricious, an abuse of discretion, or otherwise not in conformance with the standards of section 706(2). The corporate parties initially contend that the court does not have before it the full administrative record, and the court first considers that claim.

The FTC has not produced, as part of the administrative record, the following materials: (1) the "blue" minutes of the Commission, which are primarily instructions of the staff; (2) the Commission's chronological minutes, which summarize deliberative communications among and between the Commissioners and the staff; memoranda authored by individual Commissioners; (4) nonpublic documents authored by Commission staff; and (5) documents containing confidential business information. The corporate parties cite no cases holding that the blue minutes or chronological minutes must be included in the administrative record. Indeed, in this circuit those minutes ordinarily are exempt from disclosure under the Freedom of Infor-

mation Act. *Ash Grove Cement Co.* v. *Federal Trade Commission,* 511 F.2d 815 (D.C. Cir. 1975). Similarly, courts have not required memoranda authored by individual Commissioners to be included in the administrative record. The analogy to Freedom of Information Act cases again is instructive, as disclosure of the views of the individual Commissioners is not required. *Sterling Drug, Inc.* v. *Federal Trade Commission,* 450 F.2d 698, 707-08 (D.C. Cir. 1971); *see Renegotiation Board* v. *Grumman Aircraft Engineering Corp.,* 421 U.S. 168, 189-90 (1975). Nor do the staff-authored memoranda and documents reflect an official expression of the intent of the Commission requiring their inclusion in the administrative record. *See Sterling Drug, Inc.* v. *Federal Trade Commission, supra,* 450 F.2d at 706; *Securities and Exchange Commission* v. *National Student Marketing Corp.,* 66 F.R.D. 157, 160 (D.D.C. 1975). The FTC has not explicitly relied on any of the disputed staff-authored documents in making its determination, and they remain protected deliberative documents. Finally, it seems clear that confidential business information submitted to the FTC is not required to be made part of the administrative record. The corporate parties nowhere so contend and, indeed, have expressed great concern in this proceeding about the FTC's treatment of their own confidential business information.

The documents the corporate parties wish to include in the record, which are largely deliberative in nature, do not fit within the general definition of the administrative record. The Supreme Court has long held the view that the mental processes of the decisionmaker should not be probed, at least where that decisionmaker has supplied contemporaneous reasons for his decision. *Camp* v. *Pitts,* 411 U.S. 138, 143 (1973) (*per curiam*); *United States* v. *Morgan,* 313 U.S. 402, 422 (1941). This circuit has held that in an informal rulemaking case the "whole record" consists of "comments received, hearings held, if any, and the basis and purpose statement." *Rodway* v. *Department*



*of Agriculture,* 514 F.2d 809, 817 (D.C. Cir. 1975). As the court noted in *Norris and Hirschberg* v. *Securities and Exchange Commission,* 163 F.2d 689, 693 (D.C. Cir. 1947), *cert. denied,* 333 U.S. 867 (1949):

> An administrative agency, such as the respondent here may utilize the services of subordinates to sift and analyze the evidence received by a trial examiner and subsequent use by the agency of a written resume of that sifting and analyzing is a part of the internal decisional process which may not be probed on appeal.

*Id.* at 693 (footnotes omitted). The court thus concludes that it has the entire record before it and need not require the production of the essentially deliberative materials at issue which should not be considered part of that record.

Nonetheless, the record in this case is rather extensive. The court has reviewed it carefully with an eye toward the deficiencies that the corporate parties have asserted vigorously in several of their memoranda. The court has a limited role to play, however, in reviewing agency action to determine whether it is arbitrary or capricious. This court cannot merely substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). Rather, after a searching and careful inquiry, the court should determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Id.* The record of this case indicates clearly that the FTC made its decision after considering the possible problems concerning the LB and CPR programs, including many of the alleged problems that the corporate parties have identified in this proceeding. No clear error of judgment can be perceived, and certainly the fact that the corporate parties disagree as to certain matters, such as the suitability of the data to be collected, does not transform the FTC's judgment into a clear error. As the Court noted in *Overton Park,* the ultimate standard of review is a narrow one. *Id.*

Under this narrow standard of review, the court concludes that the Commission's action was neither arbitrary, capricious, an abuse of discretion, nor otherwise not in accord with the standards set by 5 U.S.C. § 706(2).

## II. Corporate Parties' Motion for Reconsideration

The corporate parties move at this time for reconsideration of two aspects of this court's decision of April 12, 1977. First, the corporate parties ask the court to reconsider its determination that the LB program does not constitute rulemaking. This is not necessary. Although the corporate parties offer to prove that certain companies will have to change their recordkeeping practices in order to comply with the LB program, such a factual determination is not determinative. The FTC has not in fact prescribed any particular accounting methods, and the LB orders do not direct revision of recordkeeping or accounting methods. Any actual revision undertaken by any company will be a voluntary act on its part as an indirect response to the orders. The court believes its prior discussion of the regulatory impact of the LB orders is sufficient.

Second, the corporate parties ask the court to reconsider its "factual finding" that the corporate parties have not alleged that the data to be collected is useless. The court did not understand the corporate parties seriously to be asserting that the LB data would be utterly without any utility whatsoever, but even if that is the case, no change in result is necessary. The record in this action provides an ample basis for drawing the limited conclusion, without further evidentiary hearing, that the data sought in the LB program is not totally useless; thus no genuine issue of material fact is presented. In any event, the court believes



that it should defer considerably to the FTC's determination as to the utility of the data.[7]

## III. FTC's Motion for Reconsideration

The Commission requests the court to reconsider its decision to require the FTC to give ten days notice to any company before publishing that company's individual CPR data. The court required this short notice period because it believed that the corporate parties raised their trade secret claim prematurely; the court further believed that the corporate parties should not necessarily be precluded from raising this claim when and if a final decision to publish has been made. The FTC now correctly notes that *FTC v. Texaco,* —— F.2d ——, No. 74-1547 (D.C. Cir. Feb. 23, 1977), does not mandate a ten day notice period or lay down a rule of general applicability; indeed, the court simply approved the FTC's offer of a ten day notice period in that case. Nonetheless, this court is convinced that fairness requires a similar notice period in this case. This will hardly constitute undue meddling in the affairs of the Commission.

The court does agree with the FTC that the ten day notice should be given only to those companies who formally apply for confidential treatment for their data *after* submission of it to the Commission. If the FTC either denies confidential treatment in whole or in part or fails to act on a request, the notice requirement would apply. The court also will amend the portion of its April 12, 1977 order dealing with the ten day notice requirement to elimi-

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[7] The corporate parties also ask the court to consider their claim that the FTC cannot meet its LB confidentiality pledges because of its past practice and the disaggregability of the data. It is premature for the court to consider the disaggregability of the data in the absence of a final decision to publish it; likewise, a court should not consider the corporate parties' other concern unless and until a specific claim of violation of the 1974 confidentiality guarantees arises.

nate an ambiguity brought to the court's attention by the FTC; the corporate parties have no objection to this minor change.

### IV. Corporate Parties' Motion to Dismiss

The court deferred consideration of certain of the corporate parties' motions to dismiss the enforcement actions for lack of personal jurisdiction on January 21, 1977 so that the FTC could engage in certain limited discovery on that question. The Commission has submitted a supplemental memorandum on the personal jurisdiction issue, to which the three corporate parties still pressing this claim have replied. This court elucidated the applicable standards for personal jurisdiction in its January 21 opinion.

Applying those general standards to the present controversy, it is clear that this court can exercise valid personal jurisdiction over two of the respondents, American Beef Packers, Inc. and Square D Company. American Beef Packers solicit orders by telephone in the District of Columbia; during a 23 month period—February 1975 to December 1976—the company made sales with a wholesale value of $424,000 in the District. Six employees of Square D solicit sales within the District, some of whom communicate with customers or potential customers on a daily basis. Squire D shipped goods to distributors in the District worth $2,000,000-3,000,000 between 1974 and 1976. In addition, the company mails advertising to 220 District recipients approximately six times per year at an allocated cost of $5,000-6,000. These contacts obviously are substantial and form a clear basis for exercise of personal jurisdiction. *See Payton* v. *Summit Loans, Inc.*, 253 A.2d 459 (D.C. Ct. App. 1969); *Key* v. *S.C. Johnson & Son, Inc.*, 189 A.2d 361 (D.C. Ct. App. 1963); *Frene* v. *Louisville Cement Co.*, 134 F.2d 511 (D.C. Cir. 1943). That the cause of action is unrelated to these activities within the District and the sales to District customers constitute a small percentage of the companies' total sales does not defeat personal jurisdiction here because the absolute amount of those sales is high. *Cf. Founding Church of Scientology* v. *Verlag*, 536 F.2d 429, 432-33 (D.C. Cir. 1976) (court should consider absolute total of sales as well as percentage of total sales).



With respect to Van Dorn, however, the court cannot conclude on the present state of the record that the FTC has established personal jurisdiction. Van Dorn apparently neither solicits nor makes sales to District customers, but it has refused to answer an interrogatory concerning advertising within the District. The Commission has not moved to compel the answer to this interrogatory. Accordingly, the FTC has failed to establish a valid basis for the court's exercise of personal jurisdiction, and the enforcement action against Van Dorn should be dismissed. The FTC has suggested, however, that its enforcement petition be treated as a counterclaim to Van Dorn's preenforcement action. This proposal makes sense to the court, and Van Dorn has no objection to this procedure.

### V. Undue Burden—Cost of Compliance

This court previously has concluded that the corporate parties' claims of undue burden should be limited to the assertion that the cost of compliance with the forms would be undue. Memorandum Opinion of April 12, 1977, at 36, 38. The corporate parties then were invited to submit up to five affidavits on the cost of compliance question. Five such affidavits were submitted on the LB program, but none were filed for the CPR program.[8] It thus appears that the corporate parties have essentially capitulated on their cost of compliance challenge to the CPR orders; they certainly have failed to carry their burden of demonstrating that those orders should not be enforced because they would entail an undue burden. The court then invited any or all of the five affiants to give evidence at an oral hearing held

[8] The FTC submitted, but later withdrew, three counter-affidavits directed to the question of cost of compliance with the LB orders.

June 16 and 17, 1977. Messrs. Howard Siers and John Spellman appeared to testify for the corporate parties; Dr. William Long testified briefly on behalf of the FTC. On the basis of the affidavits in the record, the oral testimony, and the administrative record before the court, the court hereby enters the following findings of fact and conclusions of law on the issue of cost of compliance with the 1974 LB orders.

## Findings of Fact

1. The starting point for considering the likely cost of compliance is the 1974 LB form itself and related materials. The related materials include the Instructions, a Glossary, a list of Industry Categories (LB Pet. Exh. F), and two sets of Questions and Answers issued by the Commission's staff (LBX 156, 159).

(a) The Instructions provide general guidance and specific line-by-line directions for completion of the form.

(b) The Glossary defines many of the terms used in the form and instructions, frequently using definitions adopted by other government agencies in information-gathering activities.

(c) The Industry Category list defines categories adopted by the Commission for LB purposes on the basis of the "four-digit" classification level of the Standard Industrial Classification ("SIC") System developed by the Office of Management and Budget as a standard frame of reference for government information gathering, augmented in some instances by reference to the "five-digit" level of classification adopted by the Bureau of the Census on the basis of the SIC codes.

2. As explained by the LB Instructions (p. 6) and Glossary (pp. 3, 5, 6), a "line of business" ("LB") will generally consist of the company's "basic components" having the same "primary activity,' provided that the LB satisfied certain "specialization" requirements; a basic



component may be an establishment (*e.g.*, plant), a product line, profit center, organizational unit, or other such part of the company, and the "primary activity" of a company, basic component, or LB, as the case may be, is the "industry category" that accounts for the greatest percentage of its net operating revenues. As the instructions indicate (pp. 7-8), in some instances vertically integrated companies may or must include activities preceding or following manufacturing in the industry category for the manufacturing activity.

3. In determining its basic components a company must ordinarily satisfy certain "specialization" requirements intended to limit the extent to which the data reported for an LB are "contaminated" by inclusion of data relating more properly to an industry category other than the primary activity of the LB. The "specialization ratio" (Glossary p. 6) is the ratio of operating revenues for the primary products to the sum of such revenues for primary and other ("secondary") products. The requirements are that the specialization ratio for the basic components be no lower on average than the coverage specialization ratio for the company's establishments, and that the ratio be at least 85% for each manufacturing LB with $10 million or more in net revenues (Instructions p. 6).

4. The LB form consists of four schedules, one of which contains three segments.

(a) Schedule I calls for identification data and involves no material burden.

(b) Schedule II calls for limited descriptive data about the company's LBs, including an estimate of net operating revenues for each of the LB's products.

(c) Schedule III(A) calls for data on specified items relating to profit or loss for each LB (*e.g.*, net operating revenues; transfers; cost of operating revenues; other traceable costs and expenses; nontraceable costs and expenses; operating income).

(d) Schedule III(B) calls for data relating to the assets of each LB (*e.g.*, gross plant property and equipment; depreciation; depletion and amortization; inventories; other assets) broken down between traceable and nontraceable elements.

(e) Schedule III(C) calls for supplementary data concerning various items such as payroll, research and development, methods of valuing inventories, methods of depreciation, methods of valuing intracompany transfers; general age of assets.

(f) Schedule IV calls for a summary reconciliation with respect to specified items between the aggregated LBS and certain items in the company's annual report (see Tr. 434-37).

5. The Instructions contain a number of provisions that give the company various options, authorize reasonable estimates or allocations—in a manner determined by the company—by providing for exceptions, and encourage consultations with the Commission's staff about compliance problems.

6. Among the options included are:

(a) Optional adoption by reference of material previously filed for lines 2-6 of Schedule I (p. 3);

(b) Optional combined reporting in Schedule I for non-manufacturing subsidiaries and for non-material subsidiaries (p. 4);

(c) Optional combined reporting of LB's with less than $10 million in net operating revenues in "catch-all" category 99.99 (p. 5);

(d) Optional inclusion or exclusion of operations regulated by government regulatory agencies (p. 6 and Glossary of Terms used, p. 2);

(e) Alternatives for determining basic components (p. 6);



(f) Optional use of value of shipments data or net operating revenues data for calculating specialization ratios (p. 6);

(g) Optional consolidated or separate reporting of certain vertically related operations (p. 8);

(h) Optional combined reporting, using the designation "all others," or products for the 99.99 category in Schedule II (p. 9);

(i) Alternatives for allocation procedures (p. 12).

7. Among the explicit references to use of estimates or approximations are the following:

(a) In general, well-informed estimates are to be provided when data are not provided in existing accounting reports. Thus, the Instructions state:

> Reporting corporations need not develop new accounting systems or substantially rework data processing procedures in order to complete the LB Form. It is not necessary to reconstruct data from information in invoices or other primary documents. If the data required for the LB Form are not provided exactly in accounting reports which are already in existence, reasonable, well-informed estimates should be provided by knowledgeable company staff.

(b) Only estimates of 5-digit product net operating revenues are called for in Schedule II (p. 9);

(c) For Schedule III(C) data, estimates are explicitly identified as appropriate and the instructions make clear that it is not necessary to make a complete or sample survey of primary documents (p. 13);

(d) Records used to compile data on payrolls and materials used for Bureau of Census form MA-100 are explicitly cited as possible sources for estimates of the corresponding data for Schedule III(C) (p. 13);

(e) Data in Schedule III(C) concerning various methods need only be approximate percentages (p. 14).

8. The certification on the LB Form, required to be signed by a responsible company official provides as follows:

> This report was prepared under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that reasonable estimates have been made when company accounts do not provide the requested data, the information is, to the best of my knowledge, true, correct, and complete.

Thus, (1) compilation procedures are viewed explicitly in terms only of instructions given by the FTC, thereby ruling out the needs to adhere to any other set of compilation or reporting requirements; (2) reasonable estimates are explicitly permitted when the requested data are not provided in the company's accounts, thereby ruling out the need for perfect accuracy; and (3) the affirmation is based on the knowledge concerning the compilation which is possessed by the signer, thereby ruling out liability for unintentional errors.

9. The five affiants submitted the following estimated costs of compliance: DuPont—$350,000 to 700,000; Grace—$630,000; Eaton—$500,000; Goodyear—$150,00; and Hobart—$1,000,000 to 3,000,000. The two witnesses, Mr. Siers of DuPont and Mr. Spellman of Grace, reiterated in their oral testimony the respective cost estimates of their two companies.



10. Since the court's orders of April 12 and June 3 gave the corporate parties complete freedom in selecting affiants and witnesses concerning cost of compliance, it is fair to assume that the five affidavits and the two witnesses represent the most favorable and defensible estimates of compliance cost the corporate parties could provide.

11. This inference is confirmed by the fact that the estimates of the five companies exceeded—in most cases by a large margin—every estimate concerning the 1975 LB form previously submitted to the Commission or the courts and also exceeded virtually all of the few additional estimates previously submitted by some of the corporate parties to GAO or to the Commission at an earlier stage. Similarly, the estimates submitted to the Commission by DuPont ($1.2-$1.8 million) and Grace ($500,000) for completing the 1973 LB form in full were, respectively, the highest and third highest of all (LB Pet. Exh. E, pp. 7-8; 73 Ad. Rec. 30 M. pp. 1-2).

12. There is no factual basis for concluding that the estimates of the five companies submitting affidavits on May 5 or of the two that testified are typical or representative of the costs likely to be sustained by others of the corporate parties. The company witnesses testified that they had no basis for believing that their estimates were representative (Tr. 151, 152, 360). The DuPont witness acknowledged that the problems of transfer pricing and allocation that were significant factors in his compliance cost estimate were more pronounced in chemical manufacturing (in which both DuPont and Grace are involved) than in other manufacturing (Tr. 215).

13. For several reasons, the court believes that the affiant companies may have overestimated the cost of compliance actually imposed by the 1974 LB form.

(a) Mr. Siers' affidavit and testimony were the most detailed, and the court begins here. Siers testified that a significant mismatch between the company's existing or-

ganizational structure and accounting system with the prescription of the LB form requiring reporting on a uniform set of defined lines of business accounted for the high estimated cost of compliance. In his laudable desire to produce high-quality data, however, Siers may have based his compliance estimate on procedures not actually required by the LB form. In addition, it is not clear that Siers has exhausted the possibility of finding at least some of the data from existing sources.

Although Siers testified that DuPont does not maintain its internal accounting records on the basis of the Standard Industrial Classification ("SIC") codes (Tr. 12, 87), he was unable to reconcile that assertion with the statement in DuPont's 10K report that, in the tables concerning profitability of product groups in the annual report, "individual products [are] generally classified according to the Standard Industrial Classifications * * *" (FTC Hearing Exh. 1, 10K p. 2). Moreover, Siers conceded that DuPont was required to and did report to the Cost of Living Council on a four-digit SIC code basis (Tr. 180). In addition, Siers included substantial amounts for reviewing original documents at the plant level (including travel)—even though the LB instructions explicitly state that "[i]t is not necessary to reconstruct data from information in invoices or other primary documents" (LB Pet. Exh. F, p. 2)—thereby overstating costs (Tr. 139-40). Siers also indicated that he might not choose the least costly basic component for the 1974 LB form if his consideration of the subsequent year's data indicated that different specialization ratios might result (Tr. 26, 201, 233). However, he conceded that neither the LB form and instructions nor generally accepted accounting principles require such consideration of future compliance, and that he would not have been in a position to make such a comparison if he had filed the 1974 LB form when it was due (Tr. 201). Moreover, the Commission has expressly indicated that where there are variations in specialization ratios in the range of 85% between the current year and a prior year, an exception may be appropriate.



(b) The court perceives similar problems with Mr. Spellman's estimate of the cost of compliance for Grace. Spellman's estimate includes a total of $90,000 to an independent accounting firm (Tr. 246, 280), even though review by outside accountants was a step that Mr. Siers did not believe was necessary (Tr. 165). Indeed, even Spellman acknowledged that review by an independent accountant was not "necessary" would only "probably" occur and, if done, would in part be to provide "comfort' 'to the company (Tr. 279, 368). Grace's estimate also appears to include an unspecified amount for the kind of legal review usually given to a 10K report filed with the SEC or an annual report to stockholders, even though: the LB reports will not be public; such review is not given to all other nonpublic filings, such as Census reports; and Spellman said this was something they would only "probably" do (Tr. 350-52).

(c) In addition, the court identifies several areas in which DuPont, Grace, and the other three affiant companies probably could reduce the estimated compliance burden and still meet the requirements of the 1974 form. For example, the two witnesses both testified that they would provide accounting quality data comparable to that which they provide in annual reports to stockholders or other financial statements required to conform with generally accepted accounting principles ("GAAP"), including principles such as "verifiability" and "traceability." They said they would do so as a matter of "business judgment" or "company policy" (Tr. 169, 367; see Roberts Aff. ¶¶ 6-7), even though data of such quality were not required by the Commission (see Tr. 444-45, 453) and, as they both conceded, were more expensive to compile than data not meeting such high standards (Tr. 165, 206, 364). Mr. Siers testified that, apart from company policy, his assumption that GAAP must be satisfied was based on his own interpretation of the requirements of the LB form and certification (Tr. 69, 163, 165-67, 206), which he regarded as more stringent than the usual certification of an independent

accountant (Tr. 66), although the LB instructions in no way refer to GAAP and the manager of the Commission's LB program had the contrary view of the relative stringency of the certifications when read in the context of the 1974 LB form and instructions (Tr. 440, 451). The witnesses' testimony about the effect of the LB form certification on the standards they would apply is also contrary to their testimony about their companies' income tax returns, in which they conceded that in forms required to be certified as "true and correct" they make estimates or allocations that are not in accordance with GAAP and claim deductions or credits based on their view of the law even if a point is the subject of dispute or conflict (Tr. 177-78, 373, 375).

The other affidavits tend to be highly generalized and conclusory, referring, for example, to a lack of correlation between LB categories and the categories used in the companies' own records, but without identifying specifically the nature or extent of such noncorrelation. Because Hobart presents the highest estimated cost of compliance ($1.3 million), the affidavit of Harland Mischler deserves special mention. The affidavit supplies little information regarding the number or kind of personnel that would be required, hourly rates assumed, allocation of corporate overhead, travel, etc. The affidavit also supplies little information on Hobart's corporate structure that would permit an assessment of what data are or are not readily available to Hobart for use in preparing the LB form or what problems may be presented concerning relevant cost factors such as the specialization ratio, transfer pricing, and allocations. The affidavit adopts a previous estimate made by Hobart concerning the 1973 Form LB without acknowledging or discussing the differences between the 1973 and 1974 forms (¶ 4). Moreover, a substantial portion of Hobart's projected cost is based on Mischler's assumption that Hobart must modify more than 300 computer programs and reconstruct at least 400,000 transactions per month (¶ 8)—an



assumption which apparently disregards the instructions for the LB form indicating that compliance does not require the reconstruction of data from information in primary documents and that estimates may be used. The credibility of Hobart's estimate of its compliance cost is also impaired by the fact that in an affidavit executed on March 5, 1975 (*Hobart Corp.* v. *FTC*, No. 76-0839 (D.D.C.) (No. 75-49 in Delaware), Docket Entry No. 16), Mr. Mischler stated that Hobart had prepared a draft response for the full 1973 LB form using a product "divisional" approach based on existing company records which required only "several hundred" man-hours (¶¶ 14, 16, 17).

14. Even if the affidavits and testimony of the corporate parties were credited at face value with respect to the absolute amount of probable compliance costs for the 1974 LB form, no company has demonstrated that the cost of compliance threatens to unduly disrupt or seriously hinder normal operations of its business.

15. Most of the companies that have provided specific cost estimates have failed to provide sufficient information to permit the Commission or the court to assess the estimated cost relative to the other operations of the company. The record indicates, however, that even for the companies presenting some of the most extravagant cost estimates the amount involved is relatively small. For example, DuPont's upper estimate of $700,000 amounts to 0.0084% of its 1976 sales of $8,361,000,000 (FTC Hearing Exh. 1, 10K p. 1), while Grace's estimate of $630,000 amounts to 0.017% of its 1976 sales of $3,615,153,000 (FTC Hearing Exh. 5, 10K p. 9), and Goodyear's estimate of $150,000 amounts to 0.0028% of its 1974 sales of $5,300,000,000 (FTC Reply Exh. Z). That an amount on this order is of *de minimis* proportions for such companies is indicated by the fact that some of them round off to the nearest million in their annual reports (*e.g.*, FTC Hearing Exh. 1, AR, p. 23).

16. This pattern of relatively insignificant burden is likely to exist as to all the corporate parties, since they were selected to receive orders to file the 1974 Form LB in part because they are among the country's largest domestic manufacturing corporations (LB Pet. Exh. D, pp. 4-5). Information provided by some of the corporate parties in statements filed with the SEC for 1974 reveals that their revenues are sizeable: *e.g.*, American Cyanamid, $1.8 billion; American Home Products, $2 billion; American Standard, $1.8 billion; Boeing, $3.8 billion; Carnation, $1.9 billion; Cities Service, $2.8 billion; Del Monte, $1.3 billion; Exxon, $45.7 billion; General Telephone & Electronics, $2.8 billion; General Tire & Rubber, $1.8 billion; B.F. Goodrich, $2.0 billion; Goodyear Tire, $5.3 billion; Honeywell, $2.6 billion; Ingersoll-Rand, $1.4 billion; Johnson & Johnson, $2.0 billion; Koppers, $900 million; Kraftco, $4.5 billion; Merck, $1.3 billion; Rockwell International, $4.4 billion; Standard Oil (Indiana), $2.0 billion; United Brands, $2.5 billion; Warner-Lambert, $1.9 billion; Westinghouse Electric, $8.8 billion; White Consolidated Industries, $1.8 billion (FTC LB Reply Exh. Z).

17. In its submissions to GAO, the Commission estimated that the cost to reporting companies of complying with the 1974 Form would be an average of $24,000 per company, with low costs under $10,000, and high costs of $75,000-$100,000 for a few large, diversified corporations (LB Pet. Exhs. D, p. 15; E, p. 9). Although the court cannot determine with precision the accuracy of these predictions, several observations can be made. Many specific cost estimates expressed in comments to the Commission or GAO were within the Commission's range (FTC Pet. Exh. C, pp. 140 (Dresser Industries, $10,000-$20,000); 196 (General Telephone & Electronics, $50,000); 198 (Gillette, 500 + man-hours); 275 (Merck, $56,000 +); GAO 74 Ad. Rec. Comments, p. 5 of Mayer, Brown & Platt letter on behalf of Oscar Mayer ($50,000-$100,000); letter of General Mills (1,000-4,000 man-hours).



18. The only corporate parties that supplied specific cost estimates to the Commission in their motions to quash were within or very close to the Commission's estimated range (LB Pet. Exhs. L-2, p. 22 (Outboard Marine, $30,000); L-21, p. 23 (CIT Financial, $30,000); L-41 (Gillette, 500 hours +); L-51 (Exh. B) (ICI Americas, $75,000 +).

19. Other than the five affiant companies, the only corporate parties which submitted specific 1974 LB estimates to the courts were within the Commission's estimated range (LBX 173 (U.S. Gypsum, $10,000); LBX 175 (CIT Financial, $15,000+) LBX 180 (CPC International, $25,000+); LBX 181 (Hart, Schaffner & Marx, $50,000-$100,000)).

20. Of 20 companies surveyed by the staff of the Commission on Federal Paperwork, cost estimates ranged from $1,688 to $63,600, with an average of $16,916 (Exh. A, pp. V-19, V-20, to affidavit of Salem M. Katsh, filed in support of the corporate parties' Motion to Strike Affidavits). While that report is inadequate insofar as it fails to reveal specifically whether the companies submitting estimates had filed LB reports and whether all the estimates concerned the 1974 LB report, and is not necessarily indicative of what the costs would be for any corporate party, it tends to suggest a general cost of compliance for lower than that professed by affiants.

21. Of the 440 or so companies served with and required to comply with the orders to file the 1975 Form LB, at least 270 companies have complied (FTC Exh. AA, ¶ 3; FTC Supp. Exh. B, ¶ 2).

## Conclusions of Law

1. The burden of demonstrating that an agency's use of compulsory process is unreasonable is on the party ordered to produce the material at issue. *United States* v. *Powell*, 379 U.S. 48, 58 (1964); *Federal Trade Commission* v. *Texaco, Inc.*, —— F.2d ——, No. 74-1547 (D.C. Cir. Feb. 23, 1977) (en banc), *cert. denied*, —— U.S. ——, 45 U.S.

L.W. 3805 (U.S. June 13, 1977). In the context of this case, the corporate parties bear the burden of showing that the cost of compliance is undue.

2. This burden is not easily met when the agency inquiry is, as here, pursuant to a lawful purpose and the request made is, as here, relevant to that purpose. *FTC* v. *Texaco, supra.* slip opinion at 39; *United States* v. *Davey,* 543 F.2d 996, 1000 (2d Cir. 1976).

3. A court should inquire whether compliance "threatens to unduly disrupt or seriously hinder normal operations of a business." *FTC* v. *Texaco, supra,* slip opinion at 40. No company resisting enforcement of the special reports orders at issue has made such a showing. Indeed, in light of the high annual revenues of many of the corporate parties, it seems unlikely that such a showing could be made even if the estimated costs of compliance were significantly higher.

4. A court also should consider whether other companies have complied with the same orders. *FTC* v. *Texaco, supra,* slip opinion at 40; *United States* v. *W H. Hodges & Co., Inc.,* 553 F.2d 276, 278 (5th Cir. 1976). Here, 270 companies—well over half of those so ordered—have completed and filed the 1974 LB form with the FTC without apparent overwhelming difficulty.

5. Similarly relevant is the size of the estimated cost compared to other costs normally borne by the company. *Cf. United States* v. *Davey, supra,* 543 F.2d at 1001. As noted, the cost of compliance for the corporate parties, even if high in an absolute sense, is not high compared to other costs borne by such large corporations.

6. The actual size of a company also should be considered. *Cf. California Bankers Association* v. *Schultz,* 416 U S. 21, 50 & n.2 (1974). This court previously has noted that the LB orders are directed to "many of the largest companies in this country." Memorandum Opinion of April 12, 1977, at 37.



7. The court also may consider whether the cost of compliance is in part due to a company's large size. *FTC* v. *Texaco, supra,* slip opinion at 40 ("the breadth complained of is in large part attributable to magnitude of the producers' business operations"). Here there is no doubt that the relative size and complexity of the corporate parties' business operations contribute to the compliance burden.

8. Finally, common sense dictates that a court should inquire only into the costs actually imposed by the LB orders and not into additional procedures that a company might undertake for its own benefit. *Cf. California Bankers Assoc.* v. *Schultz, supra,* 416 U.S. at 43 n.21; *United States* v. *Davey, supra,* 543 F.2d at 1001. The testimony before the court indicates that some of the corporate parties would attempt to produce data with a degree of accuracy and verifiability not demanded by the LB form. This goal, however laudable, does not give a true indication of the costs actually imposed by the form.

9. The court identified several areas in which the witnesses' estimate of cost compliance might be overstated but was unable to arrive at a specific dollar amount as to the actual cost of compliance for any corporate party. At most, the court can conclude that the actual cost of compliance would be somewhat less than estimated. Except for the estimate of Hobart, which the court cannot accept as valid for the reasons stated in Finding of Fact 13(c), all estimates of cost of compliance have been under $700,000, and the court believes the actual cost to be somewhat less than that. The court finds that the burden to be sustained by the corporate parties is not undue. As the Court of Appeals noted in *Texaco*:

> There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one—and must be so to serve its purpose.

Slip opinion at 40. The compliance burdens faced by the corporate parties are comparable to those found acceptable by other courts in similar circumstances. *California Bankers Association* v. *Schultz, supra,* 416 U.S. at 50 n.22 ($392,000); *FTC* v. *Texaco, supra,* slip opinion at 62 (Wilkey, J., dissenting) ($4,000,000); *FTC* v. *Dresser Industries,* 1977-1 *Trade Cas.* ¶ 61,400, at 71,492 (D.D C. 1977) ($400,000); *cf. North Carolina Utilities Commission* v. *Federal Communications Commission,* 552 F.2d 1036, 1052-53 (4th Cir. 1977) ($94,000,000).

10. Even if the actual cost of compliance is as large as the corporate parties estimate, the court alternatively finds that those costs would not present an undue burden in the circumstances of this case.

11. Since the court presumes that the corporate parties chose the companies with the highest compliance estimates to submit affidavits and to testify (Findings of Fact 10-12), it is therefore clear that no corporate party has demonstrated or could sustain the burden of proving that the compliance cost is undue.

12. Therefore, the court declines to deny enforcement of the 1974 LB orders on the ground that the cost of compliance would entail an undue burden.

/s/ Thomas A. Flannery
United States District Judge

Dated: July 11, 1977



(Caption Omitted in Printing)

(Filed July 11, 1977)

**Order**

In accordance with the accompanying Memorandum, it is by this court, this 11th day of July, 1977

Ordered that the corporate parties' motion for reconsideration be, and the same hereby is, denied; and it is further

Ordered that the FCC's motion for reconsideration be, and the same hereby is, partially granted and the fourth ordering paragraph of this court's order of April 12, 1977 is hereby amended to read:

> Ordered that, if a party having filed a CPR report requests the FTC to accord confidential treatment to specific information in such report, and if the FTC either denies that request in whole or in part or fails to act on it, then the FTC shall give that party ten days' notice before publishing any CPR data of that company for which confidential treatment has been requested; and it is further

Ordered that the motions of American Beef Packers and Square D to dismiss for lack of personal jurisdiction be, and the same hereby are, denied; and it is further

Ordered that the motion of Van Dorn to dismiss for lack of personal jurisdiction be, and the same hereby is, granted; and that the FTC's enforcement petition be treated as a counterclaim to Van Dorn's preenforcement action; and it is further

ORDERED that the FTC's motion for summary judgment be, and the same hereby is, granted, as no genuine issues of material fact remain and the Commission is entitled to judgment as a matter of law; and it is further

ORDERED that the FTC shall submit to appropriate Order and Judgment for the court's consideration no later than July 14, 1977.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASTER FILE MISC. No. 76-127

IN RE FTC LINE OF BUSINESS REPORT LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS—MASTER FILE ONLY

(FILED JULY 15, 1977)

**Final Order and Judgment**

Upon consideration of the entire record in these cases, and for the reasons stated in the court's opinions entered on January 21, April 12, and July 11, 1977, it is, by this court, this 15th day of July, 1977,

ORDERED, ADJUDGED and DECREED that:

1 The Court's orders entered on January 21, April 12, and July 11, 1977, insofar as they rule on motions, are incorporated herein by reference.

2. The motions of the Federal Trade Commission parties for summary judgment in both the enforcement actions and the preenforcement actions are hereby granted.

3. The motion of the Comptroller General for summary judgment in the preenforcement actions is hereby granted.

4. The corporate parties' motions for partial summary judgment in the enforcement and preenforcement actions are hereby denied.

5. The Commission's petition for enforcement is hereby granted.

6. The preenforcement actions are hereby dismissed.

7. The corporate parties that are respondents in the Commission's Line of Business Report enforcement proceedings shall file the 1974 Line of Business Reports, in accordance with the Commission's special reports orders to them, within 150 days from the date of this order, subject to such extensions of time as the Commission may grant pursuant to its Rules of Practice and Procedure.

8. Judgment is hereby entered in favor of the Federal Trade Commission parties and the Comptroller General.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASTER FILE MISC. No. 76-126

IN RE FTC CORPORATE PATTERNS REPORT LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS—MASTER FILE ONLY

(FILED JULY 15, 1977)

**Final Order and Judgment**

Upon consideration of the entire record in these cases, and for the reasons stated in the court's opinions entered on January 21, April 12, and July 11, 1977, it is, by this court, this 15th day of July, 1977,

ORDERED, ADJUDGED and DECREED that:

1. The court's orders entered on January 21, April 12, and July 11, 1977, insofar as they rule on motions, are incorporated here by reference.

2. The motions of the Federal Trade Commission parties for summary judgment in both the enforcement actions and the preenforcement actions are hereby granted.

3. The motion of the Comptroller General for summary judgment in the preenforcement actions is hereby granted.

4. The corporate parties' motion for partial summary judgment in the enforcement and preenforcement actions are hereby denied.

5. The Commission's petition for enforcement is hereby granted against respondents (including Van Dorn).

6. The preenforcement actions are hereby dismissed.

7. The corporate parties that are respondents in the Commission's Corporate Patterns Survey Report enforcement proceeding (including Van Dorn) shall file the applicable Corporate Patterns Reports, in accordance with the

Commission's special report orders to them, within 90 days from the date of this order, subject to such extensions of time as the Commission may grant pursuant to its Rules of Practice and Procedure.

8. Judgment is hereby entered in favor of the Federal Trade Commission parties and the Comptroller General.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1977

Misc. No. 76-127

No. 77-1728
and Consolidated Case Nos. 77-1931, 77-1942, 77-1944, 77-1947, 77-1953, 77-1956, 77-1732, 77-1930, 77-1943, and 77-1952

IN RE: FTC LINE OF BUSINESS REPORT LITIGATION,
*Appellants*

(FILED JULY 20, 1978)

Before: BAZELON and ROBINSON, Circuit Judges, and AUBREY E. ROBINSON, JR.,* District Judge, United States District Court for the District of Columbia

**Order**

It is ORDERED by the Court, *sua sponte*, that the Opinion Per Curiam, filed on July 10, 1978, be, and is hereby amended as follows:

On page 52, line 19, following the word "We" the word "need" is omitted and the word "find" is substituted in lieu thereof.

Per Curiam
For the Court,

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Nos. 78-167, 78-168 and 78-169

Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN AIR FILTER COMPANY, INC., ET AL., PETITIONERS
*v.*
FEDERAL TRADE COMMISSION, ET AL.

THE GOODYEAR TIRE & RUBBER COMPANY, ET AL., PETITIONERS
*v.*
FEDERAL TRADE COMMISSION, ET AL.

DEERING-MILLIKEN, INC., PETITIONER
*v.*
FEDERAL TRADE COMMISSION, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-167

AMERICAN AIR FILTER COMPANY, INC., ET AL., PETITIONERS

*v.*

FEDERAL TRADE COMMISSION, ET AL.

---

No. 78-168

THE GOODYEAR TIRE & RUBBER COMPANY, ET AL., PETITIONERS

*v.*

FEDERAL TRADE COMMISSION, ET AL.

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No. 78-169

DEERING-MILLIKEN, INC., PETITIONER

*v.*

FEDERAL TRADE COMMISSION, ET AL.

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-53) is not yet reported. The opinions of the district court (Pet. App. 54-78, 80-118, 121-148) are reported in part at 432 F. Supp. 274 and 291.

## JURISDICTION

The judgment of the court of appeals was entered on July 10, 1978. The petitions for a writ of certiorari were filed on July 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Federal Trade Commission must follow rulemaking procedures before issuing individual orders requiring certain corporations to file reports containing information about their operations.

2. Whether the Census Act prohibits the FTC from asking a question essentially identical to a question in a Census report.

3. Whether the information sought by the FTC's Line of Business report is reasonably relevant to the Commission's purpose and the burden of compliance is not undue.

4. Whether the Federal Reports Act required the Comptroller General to inquire broadly into the degree of probable utility or reliability of the data sought by the Commission's Line of Business report.

5. Whether the FTC used proper procedures in seeking judicial enforcement of the requests for information.

6. Whether petitioner Deering-Milliken has exhausted its administrative remedies concerning its argument that the FTC cannot use or disclose information provided in that company's reports.

## STATUTES INVOLVED

Most of the pertinent statutes are set out in the petitions. We reproduce here two relevant sections omitted from the petitions.



Part of the Federal Reports Act of 1942, 44 U.S.C. (Supp. V) 3512(c), which is omitted from the reproduction of Section 3512 at Goodyear Pet. Add. 4a, provides:

> (c) In complying with this section, an independent regulatory agency shall not conduct or sponsor the collection of information upon an identical item from ten or more persons, other than Federal employees, unless, in advance of adoption or revision of any plans or forms to be used in the collection—
>
> (1) the agency submitted to the Comptroller General the plans or forms, together with the copies of pertinent regulations and of other related materials as the Comptroller General has specified; and
>
> (2) the Comptroller General has advised that the information is not presently available to the independent agency from another source within the Federal Government and has determined that the proposed plans or forms are consistent with the provision of this section. The Comptroller General shall maintain facilities for carrying out the purposes of this section and shall render such advice to the requestive independent regulatory agency within forty-five days.

Part of the Census Act, 13 U.S.C. 132, provides:

> To the extent that the provisions of this subchapter or subchapter IV of this chapter conflict with any other provision of this title or other law, pertaining to the Secretary or the Department of Commerce, the provisions of this title shall control; but nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information.

## STATEMENT

This case involves two sets of orders issued by the Federal Trade Commission pursuant to 15 U.S.C. 46(b), requiring petitioners and many other large corporations to file special reports in its Line of Business and Corporate Patterns surveys. Although these information-gathering surveys are independent, petitioners raised many common legal objections, and the litigation concerning both sets of orders proceeded in tandem.

### A. THE LINE OF BUSINESS PROGRAM

The 1974 Line of Business Report is the first full-scale survey in the FTC's Line of Business ("LB") program. The Commission is endeavoring through the LB program to collect financial performance information (*e.g.*, sales, costs, profits) on a uniform basis from nearly 500 of the country's largest manufacturers with respect to some 260 industry categories (Pet. App. 9). The Commission plans to publish reports showing the aggregate results for each category. The Commission will not make public any company's LB report or use individual company data for law enforcement purposes, and it will not publish aggregate data if the Commission believes they will disclose individual company data.

The Commission expects that the LB data will enable it to assess relationships between market structure and performance. It believes that this will improve the effectiveness of its antitrust enforcement activities. The information needed for such analysis is not readily available.

The Commission began developing a LB form in 1970 (LBA 2655, 2798).[1] During the next several years

[1] "LBA" refers to the court of appeals' appendix in the LB report cases.



proposed LB forms prepared by the Commission's staff were reviewed by the Office of Management and Budget, pursuant to the Federal Reports Act of 1942, 44 U.S.C. (1970 ed.) 3501 *et seq*. One version was the subject of comments at a public hearing held by OMB's Business Advisory Council on Federal Reports (which included several of the petitioners). Based in part on information in the more than four hundred comments received, and consultation with accountants, the Commission's staff revised the LB form considerably and in December 1973 solicited comments on the revised form. After extensive communications with persons interested in the LB proposal, the Commission's staff further revised the proposed LB form. In March 1974 the Commission approved use of a limited version of a form for 1973 and the full version of that form for 1974 (LBA 278, 348, 351, 352). The 1973 LB form differed significantly from the 1974 LB report here in issue, and it was never used for 1974.

After the Commission served orders on 345 companies to file the limited 1973 LB form, some 225 companies filed motions to quash, many of them supported by extensive factual submissions (LBA 490-492). Although the Commission denied most of these motions,[2] its experience with the 1973 form led it to make substantial changes in the 1974 form. In April 1975 the FTC published in the Federal Register a notice of the new proposed 1974 LB form and invited and received written comments on all aspects of the LB program (40 Fed. Reg. 17081 (1975); see, *e.g.*, LBA 2353-2403). The full Commission also held a day-long public hearing (Pet. App. 10-11).

[2] The Commission ultimately withdrew the 1973 orders concerning companies that had not voluntarily compiled. More than 200 companies filed 1973 forms (LBA 2589).

In response to the comments, the FTC made still further changes and approved the final 1974 LB form in July 1975. It then submitted the form to the Comptroller General for review under the 1973 amendments to the Federal Reports Act of 1942, 44 U.S.C. (Supp. V) 3512, stating that the Commission had reconsidered the issues (LBA 729). The General Accounting Office solicited comments on the form; after reviewing these comments (including many from petitioner) it informed the FTC that the 1974 form satisfies the criteria of the Federal Reports Act (Pet. App. 11, 48-49 & n.147; LBA 789-802).

The Commission served orders requiring petitioners and many other companies to complete the 1974 LB report. This created still another opportunity for review; some 180 companies took advantage of their right to ask the FTC to quash its own orders (Pet. App. 11-12). The Commission denied most of these motions, writing an opinion addressing the objections raised by the companies (LBA 878-896). Most of the companies initially served by the Commission have filed 1974 LB reports; others, including petitioners, have refused to do so.[3]

## B. THE CORPORATE PATTERNS SURVEY

The Corporate Patterns Survey Report (CPR) requests information concerning corporate relationships and market structure. The FTC previously conducted such a survey covering the 1,000 largest domestic manufacturing corporations in 1950. The present survey covers what the Commission believes were the 1,000

[3]The FTC also has issued orders to 481 companies, including most of petitioners, requiring submission of LB forms for 1975 and 1976. In view of the status of the present litigation, the FTC has not yet sought judicial enforcement of the orders to complete the 1975 and 1976 reports. The Commission has stated that it will again invite comments before making major changes in the LB program.



largest companies in 1972 and others that were in the 1950 survey. Like the 1950 survey, the CPR form calls for, *inter alia*, "best estimates" of the reporting companies' value of shipments from domestic manufacturing establishments, using certain uniform definitions developed by the Census Bureau (Pet. App. 23 n. 61).

The Commission's primary purpose in conducting the CPR survey is to develop an internal data bank to facilitate expeditious analyses for law enforcement, economic studies, and policy planning (Pet. App. 12; see CPRA 256-261).[4] The Commission contemplates the possible publication of aggregate and individual company CPR data but has made no decision to do so. It has determined that it would not publish any individual company data unless the data were at least five years old (CPRA 303, 472), and it has indicated that it may grant further confidential treatment to data in a company's CPR report on a showing of need (Pet. App. 43; see CPRA 472, 477).

Work began on the present CPR survey in 1972 (Pet. App. 13; see CPRA 1048). The Commission conducted a pretest of a CPR form using a small number of companies (CPRA 267), and the Commission's staff conferred with the Census Bureau and other pertinent federal agencies (CPRA 265). After deleting some questions to reduce the burden of compliance (CPRA 268), the Commission approved the present CPR form in December 1974 and submitted it to the General Accounting Office for review (CPRA 256). GAO invited and received comments on the CPR form from the public (including many of the petitioners) and from its own consultants; it advised the

[4]"CPRA" refers to the court of appeals' appendix in the CPR cases.

Commission that the form is consistent with the Federal Reports Act (CPRA 777).

The Commission later served orders requiring some eleven hundred companies to file CPR reports within 90 days. Some 390 companies, including most of the petitioners, eventually filed motions to quash the Commission's orders. After modifying the CPR form in response to the motions, the Commission denied the motions, addressing each of the objections that had been raised (Pet. App. 13-14; CPRA 455-491). The great majority of the companies filed CPR reports (CPRA 811); most of the petitioners refused to file the reports.

### C. THE LITIGATION

Many of the companies that elected not to comply with the FTC's orders filed suits against the Commission, arguing that its orders are invalid.[5] The Commission instituted proceedings seeking enforcement of its orders. The actions filed by the companies were transferred to the United States District Court for the District of Columbia and consolidated with the Commission's proceedings.

The district court first held (Pet. App. 55-57) that the FTC's enforcement proceedings were procedurally sufficient. It then granted the Commission's motion for summary judgment on most issues (*id.* at 80-120) and

[5]Many companies also sought judicial review of the 1973 LB orders. One district court denied preliminary relief. *Aluminum Co. of America* v. *FTC*, 390 F. Supp. 301 (S.D.N.Y. 1975). Another granted preliminary relief, but that decision was reversed on the ground that the companies had not shown irreparable injury. *A.O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108, 1125 (D. Del. 1975), rev'd, 530 F. 2d 515 (3d Cir. 1976). This litigation became moot when the Commission withdrew the orders to file 1973 LB reports.



allowed the companies to proffer additional evidence on the remaining issues. After two days of evidentiary hearings, the court found that the burden of compliance by the companies would not be excessive (*id.* at 121-150). It therefore ordered the companies to comply with the FTC's orders, provided that the FTC give notice to any company requesting confidential treatment before publishing its individual company CPR data. The court of appeals affirmed (*id.* at 1-53).[6] We summarize in the pages that follow the pertinent portions of the court of appeals' opinion.

## ARGUMENT

The petitions present no question warranting review by this Court. The court of appeals wrote a thorough opinion, on which we essentially rely. Moreover, several of the questions presented by the petitions are not properly before the Court or need not be reached.

1. Petitioners argue that the procedures established by the Administrative Procedure Act ("APA"), 5 U.S.C. 553, must be followed before the Commission may require corporations to submit information.

*a.* The district court held (Pet. App. 87-89, 91-92), and the court of appeals agreed (*id.* at 17 n. 46, 18 n. 48), that the Commission's requests for information do not fall within the definition of rulemaking contained in the APA, even if the APA were generally applicable to the issuance of requests for information. That decision, which involves only the application of settled principles to the facts of

[6]On September 28, 1978, the court of appeals postponed petitioners' obligation to file LB and CPR reports pending this Court's action on the petitions (Supplement to Petition in No. 78-167).

this case, is correct, and the case therefore does not require resolution of the broader issue whether the APA applies in the first place.

The district court concluded, and petitioners did not dispute in the court of appeals, that the Commission's orders were issued in aid of its law enforcement activities (Pet. App. 84-85). The surveys do not set rules or control the conduct of private parties in any way—other than to require answers to the questions. Because the surveys do not set law or establish agency enforcement policy, but simply seek basic data, they are not rules.[7]

*b*. The broad question of the application of the APA to requests for information is not presented for an additional reason: the FTC's procedures were sufficient even if the orders are treated as rules. The Commission published the 1974 LB survey proposal, invited comments, and held an oral hearing (see pages 4-6, *supra*). It solicited comments on many other occasions. It sought and received comments on the CPR form as well. The court of appeals remarked that the record "reflects an extensive consideration [by the FTC] of the problems posed by the development of these surveys" (Pet. App. 32 n. 91). The FTC has considered and reconsidered the comments and objections of hundreds of affected persons over many years, and there is no substance to petitioners' contention that the Commission did not do enough to solicit and consider their views.[8]

[7]For similar reasons, the LB survey does not prescribe accounting practices within the meaning of 5 U.S.C. 551(4). The Commission told the companies, and the district court agreed, that they need not change their accounting practices "or substantially rework data processing procedures" in order to complete the forms (Pet. App. 137, 140).

[8]Petitioners rely on the preliminary conclusion of the district court in *A.O. Smith, supra*, that the Commission had not adequately complied with the APA. But the district court's decision was reversed on appeal on other grounds, and, in any event, involved the 1973 LB forms, which had been developed using different administrative procedures. The Commission's procedures concerning the 1974 LB forms produced an ample administrative record, which was filed with and considered by the lower courts.



*c*. The decision of the court of appeals that the APA does not generally apply to requests for information and to the issuance of compulsory process is, in any event, correct.[9] It is consistent with many other decisions to the same effect. *Hannah* v. *Larche*, 363 U.S. 420, 445-453 (1960); *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 149 (1937); *United States* v. *W.H. Hodges & Co.*, 533 F. 2d 276, 278 (5th Cir. 1976); *Montship Lines, Ltd.* v. *FMB*, 295 F. 2d 147, 154 (D.C. Cir. 1961); *Walling* v. *News Printing Co.*, 148 F. 2d 57, 58 (3d Cir. 1945), aff'd, 327, U.S. 186 (1946).[10] As this Court recognized in *IT&T*

[9]See generally Pet. App. 14-21. As Representative Walter, the principal sponsor of the APA, observed, agency inquiries on questions of fact may be "entirely independent" of rulemaking or adjudication, and the statute "carefully distinguishes" inquiries from rulemaking and adjudication. 92 Cong. Rec. 5648 (1946).

[10]*NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), on which some petitioners rely (78-167 Pet. 24), is not to the contrary. The plurality held in that case only that the Board's conceded failure to comply with the APA's rulemaking requirements in deciding whether employers must provide a list of employees *to unions* did not invalidate a Board subpoena. No Justice stated that, as a general matter, the APA applies to requests by the Board that an employer furnish information to the Board for the Board's own use.

*Union Oil Co.* v. *FPC*, 542 F. 2d 1036 (9th Cir. 1976), on which petitioners also rely, is quite unlike the present case. As the court of appeals explained (Pet. App. 17 n. 46), a special statute required the FPC to conduct rulemaking proceedings before adopting a self-executing reporting requirement. The reporting requirements at issue here are not self-executing, and there is no special statute requiring the FTC to exercise its information-gathering powers through rulemaking.

v. *Electrical Workers,* 419 U.S. 428, 441-447 (1975), some types of agency activity are neither adjudication nor rulemaking for purposes of the APA, and the Act is not intended to apply to all conceivable forms of agency activity just because they may have an effect on future rulemaking or future adjudication. The APA has never been held to require that an agency follow rulemaking procedures in the issuance or enforcement of compulsory process. The companies involved in the surveys will be fully protected by the APA if the FTC's inquiries should ever lead to the promulgation of rules or to the commencement of actions against particular companies.

2. The CPR survey requires corporations to provide the Commission with information about the value of shipments in certain business categories that were formulated by the Census Bureau.[11] Because the FTC survey relies on the Census categories (so as to be compatible with aggregate data published by Census) rather than inventing new ones, the CPR survey question concerning value of shipments is substantially identical to a question that appears in the Census of Manufactures. Petitioners argue that this question in the CPR survey violates 13 U.S.C. 9, which precludes government agencies from requiring companies to produce "copies of census reports which have been retained" by them.

*a.* The language of the statute is quite plain. It forbids a request for "copies of census reports." The Commission has not requested any corporation to furnish a copy of a census report, and petitioners' argument that Section 9 means more than it says is unpersuasive.

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[11]The Census categories are based on the Standard Industrial Classifications developed for use throughout the government to promote uniformity and comparability in the collection and publication of data.



The legislative history indicates that Section 9 was directed precisely to requests for "copies" in the files of corporations. The statute was enacted in 1962, in response to this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), which held that the FTC could require corporations to furnish it with copies of census reports. The hearings and reports on the bill demonstrate that it was intended to nullify that part of *St. Regis* but to go no further; Congress considered and rejected a broader proposal that would have extended Section 9 beyond actual copies of census returns. This history is recounted at Pet. App. 27-30, and we do not repeat it here.

The purpose of confidentiality of census reports is to ensure that corporations can answer freely, without fear that their answers will be used against them; a requirement that a corporation surrender a file copy of a census report would jeopardize that assurance almost to the same extent as agency access to the answers in the hands of the Census Bureau. But the FTC question does not jeopardize that interest.[12] No one (other than the Census Bureau)

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[12]Petitioners seemingly contend that the Census Bureau supports their position that the Commission's survey is improper (78-167 Pet. 4, 8, 20). The impression is misleading. Although the comments of the Census Bureau concerning the FTC's survey were not uniformly complimentary, the Census Bureau has acknowledged before Congress that it "do[es] not question the right of FTC" to seek the information covered in the CPR survey (CPRA 633). The involved federal agencies thus are unanimous in supporting the statutory construction of the court of appeals cf. (CPRA 896). Moreover, although Congress has actively supervised the Commissions' informational programs, and has recently both enacted restrictions concerning the LB reports (Pub. L. No. 94-362, 90 Stat. 956) and amended the Census Act (Pub. L. No. 94-521, 90 Stat. 2460), it has never indicated disapproval of the Commission's attempt to obtain information on the same subjects that were the subject of prior census questions.

need ever know how any of petitioners answered the census question, or whether they gave identical answers to the Census Bureau and the FTC. Nothing underlying the idea of confidentiality of census answers makes the subject matter of the census questions forever off limits to other agencies; only the answers actually given to the Census Bureau are protected.[13] As the court of appeals recognized, the CPR survey does not "demand an answer identical" to the answer given to the census question (Pet. App. 28-29, quoting from H.R. Rep. No. 2437, 87th Cong., 2d Sess. 7 (1962)), and that is sufficient to dispose of petitioners' argument.[14]

3. Petitioners contend that, in upholding enforcement of the LB orders,[15] the court of appeals disregarded the

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[13]Petitioners conceded below that, consistently with Section 9, the Commission could properly inquire into the subject matter of value of shipments in specified markets or the facts or documents underlying a company's report to Census, and could ask the identical questions posed here if in aid of a particular or contemplated law enforcement proceeding (see, *e.g.*, Appellants' Joint Brief in the court of appeals, at 14, 32, 34, 36; Appellant's Joint Stay Motion in court of appeals, at 14). The evident contention that the same question is precluded when asked only generally in aid of law enforcement activities is without merit.

[14]The CPR orders and forms do not refer to the census reports, and the FTC does not seek the same answers. Some companies may not even have file copies of their census answers (CPRA 1037), and they would not know how they answered the earlier questions. Others may rely on more recent or more accurate data to give different responses to the FTC than they gave to the Census Bureau (Pet. App. 30). Still others may give different answers because the questions are different in some respects (Pet. App. 24 n. 63). And, as we point out in the text, the FTC need never learn whether it received the same answers that had been given to the Census Bureau.

[15]Although Deering-Milliken and perhaps the petitioners in No. 78-168 raise this question with respect to the CPR orders (78-169 Pet. 26-27; compare 78-168 Pet. 13 with *id.* at 31-32), they may not properly do so because none of the petitioners pressed this objection in the court of appeals (Pet. App. 35 n.100).



proper standard for reviewing the reasonableness of information demands enforced by compulsory process. The court erred, petitioners suggest (78-167 Pet. 26-30), by failing to weigh its own estimate of the probable value of the data sought against each company's likely cost of compliance with the orders.

The court of appeals' decision is consistent, however, with decisions of this Court and other courts of appeals in similar cases scrutinizing, as essentially independent factors, the relevance of the information sought to the purposes of the agency inquiry and the burden of compliance with the order or subpoena. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); *United States* v. *Davey*, 543 F. 2d 996, 1000 (2d Cir. 1976); *FTC* v. *Gibson Prods. of San Antonio, Inc.*, 569 F. 2d 900, 906 (5th Cir. 1978); *FTC* v. *MacArthur*, 532 F. 2d 1135, 1141-1142 (7th Cir. 1976). See also *California Bankers Association* v. *Shultz*, 416 U.S. 21, 65-67 (1974). Certainly the Fourth Amendment does not require, as petitioners suggest, that a court substitute its own policy judgment for that of the agency in determining whether the likely outcome of an inquiry justifies the expense of compliance. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 216-217 (1946).[16]

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[16]Petitioners rely (78-167 Pet. 27-29) on such cases as *FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924), where the Court rejected "the Commission's claim of an unlimited right of access to the respondents' papers" (*Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 207 n. 40) without the need to show relevance to any purpose. But, as the Court clearly indicated in *Morton Salt*, such earlier decisions had improperly "engraft[ed] judicial limitations" upon administrative process (338 U.S. at 641-642). Even if *American Tobacco* is still authoritative, it does not assist petitioners because the court of appeals assessed the relevance of the information sought. Neither *Marshall* v. *Barlow's, Inc.*, No 76-1143 (May 23, 1978), nor *See* v. *City of Seattle*, 387 U.S. 541 (1967), both relied on by

On the record before it, the court of appeals correctly determined that the LB data were "reasonably relevant to the Commission's general purpose of collecting corporate financial information in order to assess industry-by-industry performance and market structure" (Pet. App. 36) and correctly affirmed the district court's finding that "the costs of compliance were *de minimis* relative to the overall corporate operating budgets" (Pet. App. 37, 143-144).[17] Given these findings, the FTC's orders would have been enforced even if the lower courts had applied the balancing test proposed by petitioners. Indeed, in ruling on an alternative contention of petitioners—that the court should apply an "arbitrary and capricious" test, which petitioners characterized as more stringent than the test of *Morton Salt*—both courts held that, even assuming this test to be appropriate, the Commission's orders were entitled to enforcement (Pet. App. 31-32 n. 91, 115 n. 59, 129-130).

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petitioners (78-167 Pet. 27-29), is to the contrary. In those cases the Court held that prior judicial sanction (albeit *ex parte*) is required for certain types of agency inspections of business premises. There has been ample prior judicial review here, and, what is more, there is no search or inspection.

[17]Petitioners err in asserting that the lower courts found that "the burden of compliance would run into hundreds of thousands of dollars annually for some respondents" (78-167 Pet. 28). In fact, the district court found that even for the first year (which reflects one-time start-up costs), petitioners' few estimates of compliance costs exceeding $100,000 were overstated, conclusory, and of doubtful credibility, and the evidence did not call into question the Commission's estimate that costs would average under $25,000 in the first year and, in subsequent years, substantially less (Pet. App. 138-147).



4. Nine petitioners seek review of the court of appeals' ruling in both the LB and CPR cases that the Commission may seek enforcement of its orders in a proceeding in the nature of mandamus (see 15 U.S.C. 49) by filing a "petition" and securing a show cause order from the court. They argue that the FTC must file a "complaint" and secure service of a summons issued by the clerk (78-168 Pet. 16-25; 78-169 Pet. 27-28). This is the first appellate decision on this narrow procedural question, and in the absence of a conflict among the circuits the issue does not require review by this Court.

The question presented arises only in the relatively few instances where, unlike the cases cited by petitioners (78-168 Pet. 19 n.16, 21-22 n.19), the Commission seeks an enforcement order under 15 U.S.C. 49 without also seeking civil penalties under 15 U.S.C. 50. As the court of appeals noted (Pet. App. 39-40), the practice followed by the Commission here, which parallels established practice for enforcement of subpoenas, has been uniformly sustained in the cases in which it has been challenged.[18] The differences in procedure are inconsequential, and they could not have prejudiced petitioners, who have received a full hearing on all of their arguments.[19] See also

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[18]Petitioners' assertion (78-168 Pet. 21-22) of a conflict with *Richardson* v. *United States*, 465 F. 2d 844 (3d Cir. 1972), rev'd on other grounds, 418 U.S. 166 (1974), is incorrect. The issue there was whether an action seeking mandamus against a government officer was in the nature of a request for an injunction so as to require a three-judge district court. In *United States* v. *St. Regis Paper Co.*, 285 F. 2d 607 (2d Cir. 1960), aff'd, 368 U.S. 208 (1961) (78-168 Pet. 21-22 n. 19), the court held only that an action seeking civil penalties under 15 U.S.C. 50, and mandamus under 15 U.S.C. 49, was not akin to a suit in equity within the meaning of the direct appeal provisions of the Expediting Act.

[19]Petitioners received more notice and time to respond than they would have received in an ordinary civil action, were able to produce

*Schlesinger* v. *Councilman*, 420 U.S. 738, 742 n. 5 (1975) (court may hear case even though not commenced by the filing of a complaint).

At all events, the question presented may become academic.[20] It need not be reached in this case, moreover, because all of the issues raised in the Commission's enforcement proceedings also were raised in pre-enforcement actions filed by petitioners and consolidated with the enforcement proceedings (Pet. App. 8-9 n. 3, 54). The decision here disposes of petitioners' suits as well as the Commission's enforcement proceedings; petitioners are bound by the former even if not by the latter.

5. Nine petitioners contend that the Comptroller General misapplied the Federal Reports Act of 1942,

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an extensive record, and were not deprived of any opportunity to present evidence. To the contrary, the district court resolved most of the issues on summary judgment motions, as in an ordinary civil action, and conducted a trial to resolve other issues (see pages 8-9, *supra*). Under the circumstances, petitioners' reliance on cases criticizing "summary" proceedings (78-168 Pet. 18) is plainly unwarranted.

[20] Both houses of Congress have passed a bill that would amend 15 U.S.C. 49 to provide for a unified procedure for enforcement of subpoenas and special report orders. See Section 6, H.R. 3816, 124 Cong. Rec. H9337 (daily ed. Sept. 8, 1978) (conference version). The report on that bill, citing with approval the district court's decision in these cases, states that "[t]he bill would carry forward existing law under which subpoenas and orders are enforced under [15 U.S.C. 49] in summary proceedings which are instituted by petition and show cause order." H.R. Rep. No. 95-339, 95th Cong., 1st Sess. 27 n. 38 (1977). The conference report was approved by the Senate (124 Cong. Rec. S14918 (daily ed. Sept. 11, 1978)), but was not approved by the House because of a dispute on an unrelated issue. See 124 Cong. Rec. H11017-H11032 (daily ed. Sept. 28, 1978).



44 U.S.C. (Supp. V) 3512, in reviewing the 1974 LB report form (78-168 Pet. 25-29; 78-169 Pet. 28).[21] The Act provides that independent regulatory agencies must defer, for 45 days, sending certain types of questionnaires or other reporting requirements directed to 10 or more respondents, in order to afford the Comptroller an opportunity to review the form and advise the agency about specified matters. Petitioners contend that in conducting this review the Comptroller should have examined the probable utility, reliability, and meaningfulness of the data sought by the Commission's 1974 LB form. Petitioners base this claim on a provision in the Act stating that, "[w]hile the Comptroller General shall determine the availability from other Federal sources of the information sought and the appropriateness of the forms for the collection of such information, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information." 44 U.S.C. (Supp. V) 3512(d).

The court of appeals carefully considered and properly rejected petitioners' arguments (Pet. App. 47-52). The language on which petitioners rely does not require the Comptroller General to duplicate all of the functions initially performed by the FTC. Section 3512(b) of the Act, which requires the Comptroller to review proposed forms "with a view toward (1) avoiding duplication of effort by independent regulatory agencies, and (2) minimizing the compliance burden on business enterprises

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[21] It is unclear whether petitioner Deering-Milliken seeks to raise this issue concerning review of the CPR forms, but it is precluded from doing so because only the application of the Act to the 1974 LB form was challenged on appeal (see Pet. App. 47 n.144).

and other persons," establishes the limited nature of the Comptroller's substantive task.[22]

Any other interpretation of the Federal Reports Act would give the Comptroller a power Congress desired to withhold. The 1973 amendments transferred the power to review the questionnaires of independent agencies from the Office of Management and Budget to the Comptroller principally in order to reduce the degree to which review of forms could be used to interfere with the independence of the agencies in question. Section 3512 requires the Comptroller to act within 45 days, and it does not expressly give the Comptroller any power to forbid use of any particular form. The Comptroller acts under Section 3512 to give advice to administrative agencies, and it is unlikely that Congress intended that advice to encompass the full range of issues that might be raised about the "appropriateness" of the information-gathering program itself, or about its costs and benefits. Surely such advice could not responsibly be rendered in all cases within the statutory limit of 45 days. Cf. *Flint Ridge Development Co.* v. *Scenic Rivers Association,* 426 U.S. 776, 790-791 (1976).

Moreover, because the Federal Reports Act does not explicitly authorize the Comptroller General to forbid the use of any particular form, it is an unresolved issue whether the further review that petitioners seek could

[22]The Comptroller has interpreted Section 3512(d) as conforming the agencies authority rather than as enlarging the scope of review established in Section 3512(b). The Comptroller has advised Congress of his interpretation of the statute and has asked Congress to consider repealing Section 3512, amending the statute in a way that would eliminate the provision on which petitioners rely, or transferring review authority back to the Office of Management and Budget. See General Accounting Office, *Status of GAO's Responsibilities Under the Federal Reports Act* (1976).



bind the Commission.[23] There would be little point, at this late date, in requiring the Comptroller to give a further opinion. Cf. *Immigration and Naturalization Service* v. *Bagamasbad,* 429 U.S. 24 (1976). There is a further question whether the Comptroller's reports are judicially reviewable (cf. *Morris* v. *Gressette,* 432 U.S. 491 (1977)), and whether it is appropriate to infer a private cause of action when the statute has provided none. The existence of these other barriers to relief reduces the practical consequences of petitioners' challenge to the Comptroller's action.

6. Petitioner Deering-Milliken, one of several privately held companies in the FTC's surveys, argues that its replies would disclose trade secrets that should not be made public. The succinct answer to this contention, given by the court of appeals (Pet. App. 44 n. 137), is that it is premature. The Commission has not yet proposed to release any confidential information.[24] The district court has ordered the Commission to notify companies that request confidential treatment before it publishes their

[23]The Commission and the Comptroller disagree on this point, but the court of appeals did not reach it there is no need to pursue it here.

[24]The Commission believes that it can make important use of the information even if it never releases any of it, not even aggregate data, to the public (see Pet. App. 41, 43, 108-109, 131 n. 7).

[25]The district court did not require the FTC to give prior notice before publishing aggregate LB reports, but Deering-Milliken has never requested notice concerning aggregate data from these reports. When several firms requested such notice concerning the 1973 data, the Commission agreed to provide it (LBA 2259).

individual CPR data;[25] if it ever should give such notice, petitioner Deering-Milliken could raise before the Commission any arguments it may have. See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 438 (1938).[26]

[26]Deering-Milliken argues (Pet. 22) that a later presentation of arguments would be futile in light of the Commission's denial of its motion to quash the LB orders. But Deering-Milliken sought complete exemption from the survey; the Commission's decision that Deering-Milliken must answer the question is quite distinct from a decision to make any particular use of the answers. The former decision, which the Commission has made, does not demonstrate that the Commission has prejudged the latter question (see Pet. App. 43-44 & n. 137). Because an adequate administrative remedy remains available, there is no conflict with the decision in *Genuine Parts Co.* v. *FTC*, 445 F. 2d 1382 (5th Cir. 1971).



## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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AMERICAN AIR FILTER COMPANY, INC., *et al.*,
*Petitioners,*

*v.*

FEDERAL TRADE COMMISSION, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-167

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AMERICAN AIR FILTER COMPANY, INC., *et al.*,
*Petitioners,*

*v.*

FEDERAL TRADE COMMISSION, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF FOR PETITIONERS

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The Government parties argue that the petitions for certiorari "present no question warranting review by this Court." (Br. Opp. 9.) In their argument they "essentially rely" on the "thorough" opinion of the Court of Appeals. That opinion itself suggests the importance of the questions. The Solicitor General does not deny the importance of any of the three questions presented by these petitioners, unless it is impliedly by his mistaken contention that two of them need not be reached. And not even that contention is made in the Solicitor General's discussion of the scope of the confidentiality guarantees of Section 9 of the Census Act, a question whose importance has been attested at the highest levels of the Government.

Furthermore, it now appears that the court that wrote the opinion on which he relies does not agree with the Solicitor General's apparent view that on the merits the questions disposed of by the court are so unsubstantial as not to warrant further review here. The Court of Appeals, in staying enforcement of the FTC's order pending disposition of the matter in this Court, acknowledged that the issues raised by the cases are "substantial." (Supp. to Pet. Add. A at A5, A8.)

The issues raised are indeed substantial. They are, moreover, of the greatest practical and policy significance. Besides affecting vital interests of hundreds of major corporations, they go to the very integrity of important governmental programs for the collection and publication of economic information.

### I. THE CENSUS ACT QUESTION

The Solicitor General suggests that the Census Act issue is really very simple. "The language of the statute is quite plain," he tells the Court. "It forbids a request for 'copies of census reports,' " and petitioners' argument that it means more is "unpersuasive." (Br. Opp. 12.)

But a moment later the Solicitor General himself acknowledges that the statute does mean something more than it says. He takes pains to point out that the FTC in its corporate patterns survey does not purport to be requiring companies to submit in response to the census-based questions about value of shipments the same answers that they previously submitted to the Census Bureau notwithstanding that the questions are identical. (Br. Opp. 13-14.) If Congress' post-*St. Regis* amendment to Section 9 of the Census Act meant only that certain pieces of paper in company files could



not be reached by compulsory process, this argument that the FTC does not purport to require the same answers as those furnished to Census would be irrelevant. It would be enough that the FTC had not demanded the very papers that reside in company files.

The Solicitor General's argument is not irrelevant. But it is disingenuous and inadequate, because the FTC clearly hopes and expects to obtain the same answers to its value-of-shipments question as the companies furnished to the Census Bureau. Any other result would be inconsistent with the FTC's professed desire to collect individual company data compatible with the Census Bureau's published aggregate data. (See Br. Opp. 12.) To achieve such compatibility the FTC has affirmatively encouraged corporate patterns respondents to fill out their corporate patterns reports by copying the answers from their retained copies of census reports. (Pet. 9.) That plainly is what most companies will do. The fact that some companies may have lost or destroyed their file copies or that others may have corrections to make in their original census submissions (Br. Opp. 14 n.14) does not mean that the same answers are not sought.

It is quite beside the point that it will not be known whether in the case of any particular company the value-of-shipments data that the FTC will publish correspond precisely with the data submitted to the Census Bureau. (Br. Opp. 13-14.) The point is that, as the Solicitor General says, "the purpose of confidentiality of census reports is to ensure that corporations can answer freely, without fear that their answers will be used against them. . . ." (Br. Opp. 13.) To require a company to surrender its file copies of census reports to the FTC is inconsistent with that kind of confiden-

tiality. To require a company to provide to the FTC the same numbers that appear on those file copies is equally inconsistent.

Section 9 of the Census Act was amended in 1962 to restore the full promise of confidentiality that was seen to have been partially breached by this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961). The Solicitor General's error, like that of the court below, is his failure to recognize that, when the FTC asks corporations precisely the same questions that the Census Bureau asks them, in precisely the same form, the FTC is threatening again the breach that Congress sought to repair.[1]

[1] The Solicitor General states that the "involved federal agencies" are unanimous in supporting the Court of Appeals' construction of the statute. (Br. Opp. 13 n.12.) Neither the Commerce Department and its subordinate agencies, the Census Bureau and the Bureau of Economic Analysis, nor the Office of Management and Budget, is among the federal respondents in these cases. The Solicitor General's footnote does less than justice to the repeated expressions by these agencies of concern over the FTC's attempted incursion into confidential census material. (Pet. 8, 20.) The partial quotation of a Census Bureau official's testimony in the Solicitor General's footnote distorts the record. The statement that the Solicitor General quotes in part and paraphrases in part is that of Vincent Barabba, director of the Census Bureau, given in response to a series of questions posed at a congressional hearing in April 1976. In full, Mr. Barabba's statement was as follows:

> "Mr. Chairman, I would like to add that we at Census do not question the right of FTC to seek information that is needed to carry out its identified responsibilities. We do question the need for FTC to engage in a broad statistical survey of the size and scope that so closely replicates information already collected by another government agency." (CPRA 633.)

Mr. Barabba in a previous hearing described the corporate patterns survey as a "subterfuge to obtain access to data determined by the Congress to be confidential and not reachable by subpena." (CPRA 532; see *id.* at 631). He later said in an affidavit that his agency "strongly opposes this [corporate patterns] survey since in our judgment it may unnecessarily compromise the confidentiality of data furnished the Bureau pursuant to" the Census Act. (Pet. Add. C6.)

The Solicitor General's contention that petitioners have conceded that the Commission could ask the identical questions posed here if in aid of a particular or contemplated law enforcement proceeding (Br. Opp. 14 n.13) is not supported by anything to be found at the pages cited by the Solicitor General or anywhere else in petitioners' briefs and pleadings below.



## II. THE ADMINISTRATIVE PROCEDURE ACT QUESTION

The FTC's line of business and corporate patterns programs do indeed, as the Solicitor General asserts, involve "information gathering." If that were all they involved, such cases as *United States* v. *W. H. Hodges & Co.,* 533 F.2d 276 (5th Cir. 1976), and *Montship Lines, Ltd.* v. *FMB,* 295 F.2d 147 (D.C. Cir. 1961), might be authority for the Court of Appeals' resolution of the rulemaking issue.[2]

But, as we urged in our petition and as the prelitigation utterances of responsible Commission representatives amply demonstrate, "information gathering" is only a part of the story.

[2] However, even in the case of a pure information gathering program, the Court of Appeals for the Ninth Circuit has said that it was proper for the Federal Power Commission to believe itself governed by the rulemaking section of the Administrative Procedure Act, 5 U.S.C. § 553, and to publish a notice of proposed rulemaking and invite comments before directing natural gas producers to submit information on their reserves. Union Oil Co. v. FPC, 542 F.2d 1036, 1039 (9th Cir. 1976). Contrary to the Solicitor General's assertion (Br. Opp. 11 n.10), no provision of the Natural Gas Act prescribed that procedure; the Ninth Circuit said that none of the sections of the Act authorizing the FPC to obtain information "specifies the procedure to be used," and the court below did not disagree.

Both the line of business and the corporate patterns programs contemplate information *publication* as well as information collection; and in the case of the line of business program, publication, with its anticipated impact on behavior in the marketplace, investment decision making, and resource allocation, is the program's very *raison d'etre.*

In short, the challenged programs involve information-gathering "incidental to," not "independent of," the agency's exercise of a wholly different sort of power, in this case legislative. (See Pet. App. 19-20.) Because the agency's actions in adopting the line of business and corporate patterns programs set in motion information gathering and publication programs with broad, largely self-implementing regulatory purposes, those actions satisfy the definition of a "rule" in the Administrative Procedure Act and were therefore subject to the APA's requirements for rulemaking set forth in 5 U.S.C. § 553.[3]

The Solicitor General argues that the FTC's procedures were sufficient even if the line of business and corporate patterns programs are treated as rules (Br. Opp. 10). But there is no basis for a contention that something less than full compliance with the APA rulemaking requirements will suffice. See *A. O. Smith Corp. v. FTC,* 396 F. Supp. 1108, 1124 (D. Del. 1975), *rev'd on other grounds,* 530 F.2d 515 (3d Cir. 1976).

[3] Both programs, contrary to the Solicitor General's contentions, prescribe law and implement policy. The line of business program is specifically intended to influence resource allocation. To achieve this clearly regulatory purpose that program also prescribes for the future novel reporting requirements of general application. The corporate patterns program would modify or wholly eliminate confidentiality rights assured to Census respondents by Section 9 of the Census Act.



In any event, the procedures that the FTC followed in adopting the two programs fell far short of even substantial compliance with APA requirements. As the statement of facts in the petition for certiorari makes clear (Pet. 5-9), in connection with the corporate patterns program the Commission gave no notice or opportunity for interested parties to be heard. Nor do procedures that the Commission employed in connection with its 1974 and 1975 modifications of the line of business form and instructions cure its initial failure to follow prescribed rulemaking procedures before it adopted and implemented the program in 1973.

### III. THE SCOPE OF REVIEW QUESTION

The Solicitor General's principal defense of the lower courts' refusal to balance the relevance of the line of business data against the burden of compiling and supplying them is simply to assert that independent consideration of these issues has longstanding sanction in the case law. However, none of the decisions of this Court cited by the Solicitor General holds that the constitutional test of "reasonableness," devised to protect private persons from the assertion by the Government of a general warrant power, can be applied without regard to whether the burden the Government imposes on persons of whom information is demanded is in reasonable proportion to the relevance of that information. Both experience and precedent support the view that however the ultimate test may be framed, whether as "reasonable relevance" or as "undue burden," a balancing of costs against benefits lies at the heart of the judiciary's role in protecting businessmen and others against overly broad intrusions by Government. This approach has been expressly or implicitly affirmed by the Court in all search and seizure contexts. See, *e.g.,*

*Marshall* v. *Barlow's, Inc.*, No. 76-1143 (May 23, 1978); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924).[4]

The Solicitor General implies that this Court in *Morton Salt* overruled the holding in *American Tobacco* that the FTC lacks " 'an unlimited right of access to the respondents' papers' . . . without the need to show relevance to any purpose" (Br. Opp. 15 n.16). We are puzzled not only to know where any such overruling is to be found in the *Morton Salt* decision, but also and more fundamentally to learn that the Solicitor General apparently embraces a rule of law that would allow the FTC an unlimited right of access and thus would sweep away a very basic right of privacy afforded by the Constitution—to private individuals and private entrepreneurs alike. If the decision below suggests such a rule, that is reason enough for review here.

Finally, there is no basis for the Solicitor General's assertion that the lower courts "would have" reached the same result "if [they] . . . had applied the balancing test . . . ." (Br. Opp. 16.) The district court found

[4] In *Morton Salt*, which is the Solicitor General's favorite authority on this issue (see Br. Opp. 15 & n.16, 16), the Court held that the issue of undue burden was not properly before it inasmuch as no relief from the order's asserted overbreadth had been sought from the FTC. Beyond that, however, the Commission's informational demands went to specified respondents subject to an FTC cease and desist order, as part of an FTC effort to monitor respondents' compliance with that order. By suggesting in dicta a limited role for the courts in focused proceedings such as that, this Court can hardly be thought to have established a rule applicable to cases such as this where the inquiry is unfocused, its purposes vaguely defined, and the burden of compliance not clearly justified.



that the "actual cost" of compliance would be "somewhat less" than $700,000 annually for certain respondents (Pet. App. 147);[5] as for relevance, it was able to conclude only that the information sought would not be "totally useless" (*id.* at 130). If anything, given these findings, it would be fair to conclude that application of the required balancing test would have resulted in judgment for petitioners.

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[5] This finding related to four of the five companies that were permitted to submit affidavits and/or testify on this issue during the district court proceedings. Further testimonial submissions were not permitted even though the court stated that it could not determine whether the cost figures submitted by the four companies were "typical or representative" of the class of respondents as a whole. (Pet. App. 139.) The FTC had itself estimated that the annual cost of compliance for each respondent would fall within a range from under $10,000 up to $100,000. (Pet. App. 144.)

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